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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 809

ROBERT F. KLEPINGER, MIRIAM KLEPINGER, AARON W. KLEPINGER, WARREN P. KLEPINGER, AND GEORGE F. EVANSON,

Petitioners,

v.

FRED B. RHODES,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT.

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IN THE

Supreme Court of the United States

No.

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Petitioners,

v.

FRED B. RHODES,

Respondent.

Petition by Robert F. Klepinger, Miriam Klepinger, Aaron W. Klepinger, Warren P. Klepinger, and George F. Evanson, for a Writ of Certiorari for Review of a Judgment of the United States Court of Appeals for the District of Columbia, Entered February 11, 1944, Affirming a Judgment of the District Court of the United States for the District of Columbia, Entered June 10, 1943, Dismissing a Complaint for Enforcement of Discharge of the Obligation of an Express Trust or, in the Alternative, for Money Judgments.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

The matter brought within the cognizance of this Court by this petition for certiorari to the United States Court of Appeals for the District of Columbia is that court's de-

cision of February 11, 1944, construing the Act of Congress of April 1, 1942, 56 Stat. 192, ch. 207, section 11-755 of the District of Columbia Code (1940 ed., supplement 2).

Said Act consolidated the Police Court of the District of Columbia and the Municipal Court of the District of Columbia by uniting the jurisdictions of both for exercise by a court created by that Act and known as the Municipal Court for the District of Columbia. It also created the Municipal Court of Appeals for the District of Columbia. Under the lower appellate court's construction of said Act, there is ascribed to the 77th Congress a purpose thereby to achieve the following objectives with respect to the system of jurisprudence obtaining in the District of Columbia:

> 1st. To invest the Municipal Court for the District of Columbia with a specified extent of equity jurisdiction.
>
> 2d. To divest the United States District Court for the District of Columbia of the same, or corresponding, extent of equity jurisdiction.
>
> 3d. To displace the United States Court of Appeals for the District of Columbia by the Municipal Court of Appeals for the District of Columbia as the court of first appellate jurisdiction over judgments or decrees entered in the exercise of such specified extent of equity jurisdiction.

Petitioners believe that in what has just been stated by them compliance is made with the Rules of this Court requiring " a summary or short statement of the matter involved." (Rule 38, par. 2.)

The text of the statutory provisions relating to the jurisdiction of the former and the present municipal courts in the District of Columbia is printed at the beginning of the accompanying brief in support of this petition.

JURISDICTION OF THIS COURT.

This Court's optional or discretional jurisdiction, by process of certiorari, is existent in virtue of Section 240 of the Judicial Code, as amended, 28 U.S.C. 347.

DIFFERING PREDICATES OF THE CONCURRING JUDGMENTS BELOW.

This case has its inception in a complaint in the aforesaid District Court for enforcement of discharge of the obligation of an express trust of the sum of $1980.00, or, in the alternative, for money judgments. It "came on to be heard at this term" of the aforesaid District Court "on the motion of the defendant to dismiss the complaint for want of jurisdiction in equity." (R. 22.) That court dismissed upon the assigned ground that "the complaint fails to state a cause for relief in the nature of equity." (R. 22.) The aforesaid Court of Appeals affirmed upon the assigned ground that the District Court was without jurisdiction either in equity or at law, saying:

> "We need not decide whether the complaint properly stated a cause of action in equity since the alleged trust amounted to only $1980.00 and the District Court, therefore, lacked jurisdiction regardless of whether the complaint would have formerly been denoted a suit at law or a bill in equity." (R. 26.)

The District Court's rationale seemed to be only that the doctrine of this Court in *Barnes* v. *Alexander*, 232 U. S. 117, upon which the petitioners have relied throughout, was inapposite. Deeming that the sole rationale, the petitioners appealed to the aforesaid Court of Appeals, bottoming the appeal upon the proposition that, inferentially, the District Court, (which filed neither an opinion nor a memorandum in explication or defense of its judgment of dismissal), "regarded dictum in *Trist* v. *Child*, 21 Wall. 441, as authoritative, in oversight of the complete disapproval thereof in *Barnes* v. *Alexander*", supra.

A summary of the allegations of the complaint is set out under the next succeeding caption of this petition.

QUESTION PRESENTED.

No other question than the one, to wit, did the United States Court of Appeals for the District of Columbia err in its construction of the aforesaid Act of Congress, consolidating the Police Court and the Municipal Court, as aforesaid, and creating the Municipal Court of Appeals for the District of Columbia, is presented on this petition. However, it is believed that it would be accordant with manifest justice to these petitioners if this Court, in the event its discretion inclines it to grant this petition and thereafter to exercise jurisdiction as plenarily as though the case were before it on appeal, to hear and determine, additionally to the question whether the lower appellate court erred in its construction of the aforesaid Act of Congress, the question whether the petitioners' complaint "fails to state a cause for relief in the nature of equity", the District Court having decided that it did not and the lower appellate court having concluded that "we need not decide" the question.

What impels to the statement by the petitioners that it would be accordant with manifest justice for this Court to decide the latter question, in the event its discretion discerns an obligation upon it to decide the former question, are these two circumstances:

> First, if this Court so decides the former as to obviate the necessity for resort by these petitioners to the Municipal Court for the District of Columbia, without deciding the latter, then the lower appellate court's judgment would be at large as to whether the petitioners' complaint stated a cause within the doctrine of *Barnes* v. *Alexander*, 232 U. S. 117, or within any other equitable doctrine; and if its judgment constrained it to conclude that it did not state a cause for

relief in equity, then, as this Court may now be assured, petitioners would again be seeking certiorari to the lower appellate court.

Second, these petitioners, in making this effort to effect a reversal of the judgment of the lower court and a concomitant disapproval not only of that Court's construction of the aforesaid Act of Congress but also of the novel rationale of its construction thereof, conceive themselves as acting not less on behalf of the public interest than in vindication of private right; for certainly it would be less expensive to them to abide such construction and such rationale and seek relief in the Municipal Court for the District of Columbia where, as the lower appellate court says, the 77th Congress intended that they should seek relief, than to incur the expense incident to this undertaking to have it finally and authoritatively declared that the 77th Congress did not so intend.

The allegations of the petitioners' complaint, therefore, are concisely stated here as follows:

1. That in the period from on or about July 1, 1938, to August 1, 1942, one of the petitioners, namely, Robert F. Klepinger, was associated in the practice of law in the District of Columbia with the respondent, under the style, to wit, Rhodes. Klepinger & Rhodes, pursuant to two written agreements of association, each of which obligated the respondent to maintain offices for the association at his individual expense. (R. 2, 13, 18.)

2. To enable him to discharge the aforesaid obligation of maintenance of offices at his individual expense, respondent, in July, 1940, obtained a loan of $500.00 from the father and uncle of the said Robert F. Klepinger, namely, the petitioners Aaron W. Klepinger and Warren P. Klepinger, respectively. The in-

ducement to the making of such loan was a written declaration of trust, executed by Messrs. Rhodes, Klepinger & Rhodes, i.e., by the respondent, by the said Robert F. Klepinger, and by the other member of the aforesaid association, Cooper B. Rhodes. Such declaration of trust was addressed to the aforesaid Aaron W. and Warren P. Klepinger. The following is quoted therefrom:

> In consideration of a loan of $500.00 evidenced by note dated July 23, 1940, given in said sum, we agree that for your protection, in the repayment of said loan, we hereby assign all our fees in the first judgments to be awarded in the U. S. Court of Claims in the cases now represented by this office and agree to consider the same as a trust fund for your benefit". (R. 4-5.)

3. That to further enable him to discharge the aforesaid obligation of maintenance of offices at his individual expense, the respondent, also in July, 1940, obtained a loan of $230.00 from the sister of the said Robert F. Klepinger, namely, Miriam Klepinger, another of the petitioners. (R. 6.)

4. That for the purpose of enabling him to promote a commercial enterprise in which he was interested, the respondent in April, 1941, obtained the sum of $900.00 from a life-long friend of the said Robert F. Klepinger, namely, George F. Evanson, another of the petitioners. That the respondent requested the said Robert F. Klepinger to assure the said George F. Evanson that repayment of such loan would be made "not later than May 1, 1941". (R. 6.)

5. That no part of any of the aforesaid several indebtednesses having been repaid in February, 1942,—and the respondent having subsequent to the date of execution of the aforesaid declaration of trust of fees, received fees which that declaration of trust obligated

him to pay to the petitioners Aaron W. Klepinger and Warren P. Klepinger, but which he diverted to other uses or purposes exclusively his own,—demand was made on the respondent for security for repayment of the aforesaid several indebtednesses. The demand was acceded to, but only after the respondent had obtained from the said Robert F. Klepinger a promise, which was subsequently fulfilled, to make a loan of $250.00 to the respondent. (R. 7-8.)

6. Compliance with the aforesaid demand was made by the execution on February 11, 1942, of an assignment by the respondent to the said Robert F. Klepinger of "the sum of $1980.00 out of the fee of $2919.19, payable to Rhodes, Klepinger & Rhodes in the case of North Pacific Emergency Export Association, No. 45190, U. S. Court of Claims (decided January 5, 1942, judgment of $11,679.97)", it being declared in such assignment as follows:

> "this assignment shall constitute and be regarded as an attorney's lien on said fee in favor of Robert F. Klepinger to insure collection and payment of the sum of $1980.00 aforesaid * * *". (R. 8-9.)

7. That after receipt of the aforesaid fee of $2919.19 by the respondent, demand upon him for payment of the aforesaid amount of $1980.00 was made by the said Robert F. Klepinger, but the respondent refused to comply therewith, although admitting (1st) that he had executed the aforesaid assignment and declared the aforesaid fee to be subject to an "attorney's lien in favor of Robert F. Klepinger to insure collection and payment of the sum of $1980.00 aforesaid", (2d) that he had in his possession as a part of such fee the sum of $1980.00 and purposed and intended to disburse it as provided in said assignment, but stated that he would retain it in his possession

until the said Robert F. Klepinger had fulfilled conditions as follows: (a) exhibited to the respondent copies of the said Klepinger's income tax returns for the calendar years 1940, 1941, and 1942, and (b) responded to numerous inquiries by the respondent concerning the business or affairs of the association of Rhodes, Klepinger & Rhodes. (R. 10-12.)

REASONS FOR GRANTING CERTIORARI.

I. Even if the equity jurisdiction of the courts of first instance in the District of Columbia were a matter of concern only to the District of Columbia populace, instead of being, as manifestly it is, a matter of very frequent concern to persons at various places in the United States and foreign nations, (especially with regard to process out of equity to Federal agencies and functionaries), nevertheless, ample reason would exist for a determination by this Court as to whether it is indeed sound judicial doctrine

(1st) that legislation of the Congress relating to the jurisdiction of courts in the District of Columbia has contributed to "the modern tendency to abolish the outmoded distinction between law and equity",

(2d) that any such legislation subsequent to the effective date of the Federal Rules of Civil Procedure is in *pari materia* with those rules, or with the statute authorizing them, and

(3d) that, therefore, when the Congress, subsequent to such date, delimits the jurisdiction of a court in the District of Columbia, even though it be a combination of a police court and a municipal court, and in delimiting creates a jurisdiction over "civil actions", it thereby implies, and implies irresistibly, an intention to clothe such court with equity jurisdiction, even though in clothing it therewith it is denuding the District Court of the United States for the District of

Columbia of a corresponding extent of equity jurisdiction.

II. A deliverance by the highest constitutional court in a Federal Judicial Circuit, (and the District of Columbia, by courtesy at least, is regarded as constituting such a circuit), to the effect that the system of jurisprudence existing in the circuit has been disrupted by the Congress under legislation

(a) that *impliedly* displaces such court by a Municipal Court of Appeals as the court of first appellate jurisdiction over specific equity causes, and

(b) that *impliedly* divests another constitutional court of a specific extent of original equity jurisdiction and vests therewith a municipal court,

constitutes a matter of profound concern and importance throughout the circuit; *a fortiori* when the deliverance is made more than a year and seven months after enactment of the legislation and is startling to judges and lawyers everywhere in the circuit because of their conviction that there is no basis whatever either in the text of the legislation or in its history for an ascription to the Congress of an *implied* intent to work such a revolutionary innovation in the circuit's system of jurisprudence.

III. When a court in the system of constitutional courts of the United States, of as high rank therein as the United States Court of Appeals for the District of Columbia, either refuses to observe and follow, or exhibits a clear misunderstanding of, established English and American judicial doctrine in the matter of construction of statutes that expressly affect the jurisdiction at law of existing courts, but do not expressly affect the jurisdiction in equity of such courts,

with the result that the said Court of Appeals decides that it has been ousted by the Congress of a specific extent

of first appellate jurisdiction, and that a District Court of the United States has been ousted by the Congress of a specific extent of original equity jurisdiction,

although the Act of the Congress which the said Court of Appeals asserts has effected the ouster does not by express words, or by irresistible implication, constitute such an ouster,

then, and indeed, there exist "special and important reasons", and other of the considerations mentioned in Rule 38, par. 5, of this Court, that justify, if they do not require, certiorari from this Court to the said Court of Appeals.

IV. Since it is plain that the lower appellate court's construction of the aforesaid Act of Congress was wholly induced by two assumptions, to wit, (a) that legislation relating to the jurisdiction of those courts which it is competent to ordain or establish has given momentum to "the modern tendency to abolish the outmoded distinction between law and equity", and (b) that either the Federal Rules of Civil Procedure, or the statute authorizing them, are in *pari materia* with the aforesaid Act of Congress, it seems highly and immediately desirable that this Court examine those assumptions and explicitly conclude whether they are supportable and valid. Its explicit conclusions thereon might be effective to dispel delusions or illusions by one or the other of the two schools of thought on the indubitable constitutional and Congressional recognition of the distinctiveness of law and equity in Federal jurisprudence.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

Text of Those Statutory Provisions That Relate to the Jurisdiction of the Old and the New Municipal Courts in the District of Columbia.

This argument being restricted, as it should be, to a single subject, to wit, the intention of the Congress under its limitation of the jurisdiction of the Municipal Court for the District of Columbia, the text of the legislation that is definitive of such jurisdiction is set out here for the convenience of the Court in its consideration of the argument.

Section 4 (a) of the Act of Congress of April 1, 1942, 56 Stat. 192, ch. 207, sec. 11-755 of the District of Columbia Code (1940 ed., supp. 2), pertaining to the jurisdiction of the present Municipal Court for the District of Columbia—

> Sec. 4. (a) The Municipal Court for the District of Columbia, as established by this Act, shall consist of a criminal and a civil branch. The court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the Police Court of the District of Columbia or by the Municipal Court of the District of Columbia or the judges thereof on the effective date of this Act, and in addition the said court shall have exclusive jurisdiction of civil actions, including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorneys' fees, protest fees, and costs, does not exceed the sum of $3000.00 and, in addition, shall also have exclusive jurisdiction of such actions against executors, administrators and other fiduciaries: PROVIDED, HOWEVER, That the District Court of the United States for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction. The court shall also have jurisdiction over all cases properly pending in the Municipal Court of the District of Columbia or the Police Court of the District of Columbia on the effective date of this Act.

Because in the argument there is discussion of the respects in which the jurisdiction of the former Municipal Court of the District of Columbia, in "civil cases", is similar to the jurisdiction of the successor of that court, namely, the Municipal Court for the District of Columbia, in "civil actions", the text of the legislation that was definitive of the jurisdiction of the former court also is set out here. Section 11-703 of the District of Columbia Code (1940 ed.)—

> The Municipal Court of the District of Columbia shall have exclusive jurisdiction in the following civil

cases in which the claimed value of personal property or the debt or damages claimed, exclusive of interest and costs, does not exceed $1000.00, namely, in all civil cases in which the amount claimed to be due for debt or damages arises out of contracts, express or implied, or damages for wrongs or injuries to persons or property, including all proceedings by attachment or in replevin (except in cases involving title to real estate or actions against judges of the Municipal Court or other officers for official misconduct), and in actions for the recovery of damages for assault, assault and battery, slander, libel, malicious prosecution, and breach of promise to marry. (Mar. 3, 1901, 31 Stat. 1191, ch. 854, sec. 9; Feb. 17, 1909, 35 Stat. 623, ch. 134; Mar. 3, 1921, 41 Stat. 1310, ch. 125, sec. 1).

The essence of the argument is this: That the aforesaid Act of Congress of 1942, (which is hereinafter referred to as the Consolidating Act), contains provisions in many of its sections and has a legislative history that render manifestly untenable the lower appellate court's conclusion that the Act implies an intent of the Congress to distribute the judicial power in equity to the Municipal Court for the District of Columbia.

ARGUMENT.

CHAPTER I.

Assuming to Be True That Which Is False, Namely, That Legislation by the Congress Relating to the Jurisdiction of the Courts in the District of Columbia Has Contributed to "The Modern Tendency to Abolish the Outmoded Distinction Between Law and Equity", the Lower Appellate Court Has Regarded as Irresistible a Conclusion by It That the Mere Presence of the Phrase, to Wit, "Civil Actions", in the Consolidating Act's 4th Section, Necessarily Implied an Intention of the Con-

gress to Divest the District Court of a Specific Extent of Equity Jurisdiction and to Invest the Muncipal Court With It.

NOT STRICTLY A DETERMINATION WITHOUT A HEARING, BUT APPROXIMATELY THAT.

If it was a duty of the petitioners' counsel to petition for rehearing in the lower appellate court, such duty was deliberately disregarded by him, for he desired that the said court's opinion come before the Supreme Court of the United States precisely as originally written when filed on February 11, 1944. That it has been revised by the lower appellate court's order of February 16, 1944, although in respects in no wise effecting any alteration in the very extraordinary rationale thereof, indicates that the Court reconsidered it, *sua sponte*, and upon reconsideration did not perceive the existence of any cause whatever either for recalling and cancelling it in toto or for substituting any course of reasoning to its conclusion different from that originally pursued. Apparently, therefore, a petition for rehearing would have been futile if designed to convince the Court that its opinion, viewed as a specimen of the Court's logic, is a perfect example of a *petitio principii*, and viewed as a judicial construction of the Consolidating Act is indefensible in that, as shown hereinafter, it not only frustrates the evident intent of the Congress, if Congressional intent is fairly deducible from the contents of the reports of a Committee of the Congress, but also imputed to the Congress a design or purpose which all proponents of the bill that evolved into the Consolidating Act, including the Chief Justice of the lower appellate court, apparently realized as being neither expressed nor implied in the final draft of the bill as reported to the Senate by its Committee on the District of Columbia, not its Committee on the Judiciary, the latter being the Committee of

the Senate which would have had cognizance of the bill if it had been apprehended anywhere in the Senate of the 77th Congress that it provided for a divestiture of a constitutional court of the United States of an appreciable extent of equity jurisdiction and a displacement of another such Court as the court of first appellate jurisdiction over cases within such extent of equity jurisdiction.

The lower appellate court determined the issue that was presented on the appeal to it, but assigned a ground for the determination which neither the appellants nor the appellee in that court believed or supposed could possibly exist. Appellee submitted on a brief in which there is not the remotest indication of entertainment of a supposition or belief that the 77th Congress had intended so to divest one constitutional court and so to displace another such court. Appellants' brief and argument were restricted exclusively to the proposition that the court of original jurisdiction had misconceived the doctrine of this Court in *Barnes* v. *Alexander*, 232 U. S. 117. And never throughout the argument before the lower appellate court did any of the members thereof who sat in the case so interrogate counsel or otherwise express a thought as to indicate to counsel that the judicial mind perceived as the crucial question in the case, the one, to wit, did the 77th Congress purpose a divestiture of the United States District Court for the District of Columbia of a specific quantum of equity jurisdiction for the aggrandizement of the Municipal Court for the District of Columbia.

Presumably, therefore, it was in their ensuing conference on the case that the aforesaid members of the lower appellate court first discerned in the Consolidating Act a design of the 77th Congress thus to disrupt the system of jurisprudence in the District of Columbia. When such became the judicial discernment, perhaps the case should have been ordered set for reargument in order to afford an opportunity to counsel to aid the judgment of the Court to a due conclusion, if of sufficient ability to do that. But no

such order was entered, and consequently counsel for the parties will not have been heard in any court on the question which the lower appellate court resolved in disposing of the case unless heard thereon in the Supreme Court of the United States.

Lower Appellate Court's Rationale.

Intensive to the last degree though the study may be, no study of the lower appellate court's opinion will show that the rationale thereof is other than this: That the settled judicial definition of the phrase, to wit, "personal property", comprises "choses in action whether they are legal or equitable"; that the settled judicial definition of the phrase, to wit, "civil actions", comprises "both actions at law and actions in equity"; that there is a legislative "tendency to abolish the outmoded distinction between law and equity"; that, therefore, the mere presence of those two phrases in that section of the Consolidating Act which is definitive of the jurisdiction of the Municipal Court for the District of Columbia, when considered in the light of such "modern tendency", is probative of an intention of the 77th Congress under that Act thereby to divest the District Court of the United States for the District of Columbia of a specific extent of equity jurisdiction, to wit, equity jurisdiction in all "civil actions * * * in which the claimed value of personal property * * * does not exceed the sum of $3000.00", and to invest therewith the Municipal Court for the District of Columbia.

An example of judicial misconstruction plainer than the example that is furnished by such judicial ratiocinations is, it is believed, not discoverable in either the English or American reported cases. It is an example of judicial misconstruction under which a constitutional court of the United States is divested of an equity jurisdiction which it has exercised ever since it was established, to the behoof of as tiny a legislative court as it is competent for the

Congress to create, to wit, the Municipal Court for the District of Columbia, a combination of police court and glorified or sublimated justice of the peace court. It is a judicial misconstruction under which the United States Court of Appeals for the District of Columbia, another constitutional court, ceases to be the first appellate court for review of judgments or decrees of the court of original jurisdiction of equity causes "in which the claimed value of personal property * * * does not exceed the sum of $3000.00", for under the judicial misconstruction such United States Court of Appeals is displaced as such first appellate court by the Municipal Court of Appeals for the District of Columbia. Did the 77th Congress actually purpose to accomplish such a robbing of Peter to pay Paul?

Departure From English and American Judicial Doctrine.

The lower appellate court's opinion answers the aforegoing question in the affirmative. It says, in effect, that while the 77th Congress did not express an intention to accomplish such a divestiture and to achieve such a displacement nevertheless it clearly implied such an intention and implied it in the use by it of the phrases "personal property" and "civil actions" in that provision in the Consolidating Act which is definitive of the jurisdiction of the Municipal Court for the District of Columbia. But until the lower appellate court departed therefrom there had never been a departure by American courts from the following pronouncements by the courts of England:

> "* * * we will not suffer this Court to be excluded from its jurisdiction by obscure words in the statute." Hill v. Dechair, Style 381, 82 Eng. Rep. 795, King's Bench, in banc, decided in 1653.
>
> "I agree that in general the jurisdiction of this Court is not to be ousted but by express words", said

Lord Kenyon, C. J., in Cates v. Knight, 3 T. R. 442, 100 Eng. Rep. 667, King's Bench, decided in 1789.

"It is undoubtedly true that the jurisdiction of the superior courts at Westminster is not to be ousted except by express words or by necessary implication", said Tindal, C. J., in *Crisp* v. *Bunbury*, 8 Bingham, 394, 131 Eng. Rep. 445, in the English Common Pleas, decided in 1832.

In 21 C. J. S., Courts, section 92, there is this statement:

"Where jurisdiction is conferred in all cases, some special or particular law is necessary to exclude it in any particular case. * * * in general, jurisdiction once conferred is taken away only by express negative words or by irrestible implication from the terms of the statute."

It is a "settled principle that a court of equity may not be divested of jurisdiction by implication." *United States* v. *Fletcher*, 8 F. Supp. 233, 235, D. C., D. of Idaho, 1934.

Legislative Intent, Not Judicial Definition, Determines Whether "Civil Actions" Means Law or Equity Actions or Only Law Actions.

Of course it is presumed that a legislature intends that the terms it uses in creating judicial jurisdiction shall be understood in the sense of the judicial definitions of the terms. But the term "civil actions" is not invariably defined judicially as embracing both actions at law and actions in equity. It is defined judicially as meaning only actions at law, or only actions in equity, or both actions at law and actions in equity, accordingly as the judicial reason determines that it is the legislative intent to use it as meaning only actions at law or only actions in equity or both actions at law and actions in equity. The notion that since the Federal Rules of Civil Procedure denominate as civil actions both actions at law and actions in equity,

therefore it is necessarily the intent of the Congress to create in a Court a jurisdiction in equity as well as at law whenever the Congress endows a Court with jurisdiction of civil actions, is a sheer *non sequitur*, a palpable fallacy which is traceable to the too prevalent faulty thinking as to the effect of the Federal Rules of Civil Procedure.

If those rules had fused or merged law and equity they would have indeed contributed to "the modern tendency to abolish the outmoded distinction between law and equity." However, they explicitly recognize the existence of a distinction between law and equity, it being provided in the very first of them that "these rules shall govern the procedure in the District Courts of the United States in all suits of a civil nature whether cognizable at law or in equity." Therefore, the term "civil actions", at least as used in those rules, is a term of description either of law actions, or of equity actions, and denotes either the one or the other or both, according to the intent of the user of the term, i.e., according to the intent of the law-making body in using the term when defining the jurisdiction of a court. The lower appellate court says that "the words 'civil actions' are generally held to cover both actions at law and actions in equity" and cites to that statement by it several cases, all cases in State courts. Of course the aforesaid words have that connotation generally; and have always had it not only as used in opinions in State courts but also as used in opinions of Federal courts; but it is a *non sequitur* that since an equity action as well as a law action is within the sense of the term "civil action", that the Congress of the United States necessarily creates jurisdiction in equity as well as jurisdiction at law under an act by it that invests a municipal court with jurisdiction over civil actions.

Neither judicial definition nor a layman's dictionary's definitions have ever made any contribution whatever to "the modern tendency to abolish the outmoded distinction between law and equity." Constitutional provisions or

legislative enactments alone can be contributive to such a "tendency". Courts do not acquire or lose equity jurisdiction perforce only of the exercise of the judicial reason in defining terms. They acquire or lose it perforce exclusively of the sovereign will exercised in the framing of constitutions or in the exercise of the legislative discretion in delimiting or defining their jurisdiction. Therefore, when the question is whether an act of the Congress has divested a constitutional court of equity jurisdiction and vested a municipal court therewith, the primary inquiry is what was the will of the Congress as deducible not only from the text of the act but also from the legislative history of the act. That one of the terms of the act, e.g., "civil actions" has been judicially defined by State courts, or by Federal courts, or by both, is of secondary importance for, as the experienced judicial mind is aware, the term "civil actions" may well be used and often is used in statutes with an intent to confer jurisdiction at law exclusively.

Since "Civil Actions" and "Civil Cases" Have the Same Meaning, Why Was Not the Old Municipal Court Also An Equity Court?

The judicial definition of the phrase, to wit, "personal property" as used in District of Columbia Code (1940) 11-703, defining the jurisdiction of the former Municipal Court of the District of Columbia, had no meaning therein that is in any jot or tittle different from the meaning of the same phrase as used in section 4 of the Consolidating Act defining the jurisdiction of the present Municipal Court for the District of Columbia. The judicial definition of the phrase, to wit, "civil cases", as used in the District of Columbia Code (1940) 11-703, defining the jurisdiction of the former Municipal Court of the District of Columbia, had no meaning therein that is in any jot or tittle different from the meaning of the phrase, to wit, "civil actions", as used in section 4 of the Consolidating Act, defining the

jurisdiction of the present Municipal Court for the District of Columbia.

If, therefore, the mere presence of the phrase, to wit, "civil actions" in the 4th section of the Consolidating Act suffices to endow the present Municipal Court for the District of Columbia with jurisdiction in equity as well as jurisdiction at law, why was not the mere presence of the phrase, to wit, "civil cases", in District of Columbia Code (1940) 11-703, sufficient to endow the former Municipal Court of the District of Columbia with the same extent of jurisdiction? There is no reasoned answer to this question in the lower appellate court's opinion. The only statements therein that have the slightest pertinence to the question are these: That the statute delimiting the jurisdiction of the former Municipal Court of the District of Columbia "did not vest jurisdiction in civil actions generally, but only in specified types of civil actions" and that "the exclusive jurisdiction of that court extended to all cases not in excess of $1000.00 'in all civil cases in which the amount claimed to be due *for debt or damages arises out of contracts, express or implied, or damages for wrongs or injuries to persons or property*' ".

Of course the District of Columbia Code (1940) 11-703, "did not vest jurisdiction in civil actions generally", but neither does the 4th section of the Consolidating Act "vest jurisdiction in civil actions generally". Each statute vested "jurisdiction in civil actions" only to the extent of civil actions in which the value claimed did not exceed a specific sum, $1000.00 under the earlier statute and $3000.00 under the later statute. The "specified types of civil actions", however, were not less in number or variety in the old court than they are right now in the new court, if by "types of civil actions" is meant actions in trover, detinue, replevin, debt, case, contract, damages, or what not. There is absolutely no point, therefore, in the lower appellate court's emphasis upon the circumstance that the statute relating to the jurisdiction of the old court defines that

jurisdiction as "in all civil cases in which the amount claimed to be due for debt or damages arises out of contracts, express or implied, or damages for wrongs or injuries to persons or property." All such jurisdiction of the old court is now of the jurisdiction of the new court, for obviously all the jurisdiction of the old court is within the following words of description of the jurisdiction of the new court: "* * * exclusive jurisdiction of civil actions including counterclaims and crossclaims, in which the value of personal property or the debt or damages claimed, exclusive of interest, attorneys' fees, protest fees, and costs, does not exceed the sum of $3000.00."

ALTHOUGH QUOTED IN THE LOWER APPELLATE COURT'S OPINION, CHIEF JUSTICE HUGHES DID NOT PROFESS A FAITH WHICH IS CONSONANT WITH THE HETERODOX DOGMA OF THAT OPINION.

The lower appellate court was precipitated to its conclusion that the 77th Congress impliedly intended to divest the United States District Court for the District of Columbia of a specific extent of equity jurisdiction and to displace the United States Court of Appeals for the District of Columbia as the first appellate court for review of judgments or decrees entered in the exercise of such equity jurisdiction, by its utterly baseless assumption that legislation of the Congress relating to the jurisdiction of the courts that function in the District of Columbia had contributed to the "modern tendency to abolish the outmoded distinction between law and equity." The obvious truth is that neither such legislation nor any other legislation of the Congress, not excepting that which gave the American people the enlightened and beneficent Federal Rules of Civil Procedure, has made the slightest contribution to "the modern tendency to abolish the outmoded distinction between law and equity." And for the lower appellate court to imply, as it does through incorporation

in its opinion of a lengthy excerpt from an address by Chief Justice Charles E. Hughes, that the logic of its opinion or the rationale of its construction of the Consolidating Act accords with that great jurist's convictions is, it is believed, to attempt to impress the imprimatur of that distinguished American upon judicial views which he would disavow.

Such address by the now retired Chief Justice of the United States was delivered on May 9, 1935, at a meeting of the American Law Institute, less than a month before the date, to wit, June 3, 1935, on which the Supreme Court appointed the Advisory Committee that aided it in the discharge of the function assigned to it by the Act of June 19, 1934, c. 651, 48 Stat. 1064, 28 U. S. C. 723b, 723c, to "write the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." In that address there are significant words which are not of the words of the address which are quoted in the lower appellate court's opinion. The omitted words are these:

> "Of course, I am not speaking of distinctness between law and equity in the matter of substantive rights, but of mere procedure where a uniform procedure may be had consistently with all substantive rights. * * * After careful consideration, the court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law * * *."

In the aforesaid order of appointment of the Advisory Committee it is said: "* * * the court will undertake the preparation of a unified system of general rules for cases in equity and actions at law * * * so as to secure one form of civil action and procedure for both classes of cases * * *."

Obviously, the Act of 1934, supra, expressly recognized the existence of a distinctness in Federal jurisprudence

between "cases in equity" and "actions at law." Therefore, that Act made no contribution to "the modern tendency to abolish the outmoded distinction between law and equity." Chief Justice Hughes having said that he was "not speaking of distinctness between law and equity" in Federal jurisprudence, but solely of the task which the 1934 legislation had imposed upon the Supreme Court, namely, the task of a "uniform precedure" that would be compatible with such "distinctness", it is surpassing strange that he should be so quoted in the opinion of the lower appellate court as to create in the minds of readers of that opinion that he perceived in the legislation of the Congress a contribution to "the modern tendency to abolish the outmoded distinction between law and equity." And that the Supreme Court did not set about to perform such task upon any such hypothesis as the one that by the 1934 statute the Congress had given impetus to such "modern tendency"; that the said Court entered upon the undertaking in ungrudging recognition by it that cases in equity and actions at law are fundamentally in two distinct jural classifications; and that the said Court apprehended that its duty under the commission to it from the Congress was to unify procedure only and not to assume to unify or to consolidate, or to fuse, or to merge, law and equity in Federal jurisprudence, are all patent truths from the terms of that Court's order of appointment of the Advisory Committee.

> "Neither the Rules of Civil Procedure nor the Act, 28 U.S.C. sec. 723c, 28 U.S.C.A. sec. 723c, under the authority of which they were prescribed, abolish the fundamental and substantive distinction between actions at law and suits in equity. The distinction, except in matters of procedure, is cautiously maintained. Rights and remedies peculiarly legal retain their inherent characteristics, and rights and remedies peculiarly equitable likewise retain their inherent characteristics. * * * While the rules effect a unity of procedure they do not effect a merger of remedies."

Fitzpatrick v. *Sun Life Ass'n Co. of Canada*, 1 F.R.D. 713, 715 (D. C. of N. J., May 21, 1941).

Certainly no chagrin would be experienced by the writer should the distinction between law and equity be abolished. This is evident from his comment on the distinction in his volume titled Judicial Review of Federal Executive Action, section 575(b);[1] but abolishment must not, and shall not be wrought through judicial misconstructions of acts of the Congress.

UNLESS LEGISLATION OF THE CONGRESS HAS INDEED "OUTMODED" THE "DISTINCTION BETWEEN LAW AND EQUITY" THE LOWER APPELLATE COURT'S OPINION IS A MANIFEST PETITIO PRINCIPII.

Concededly, it is defensible to affirm of the constitutions and acts of the legislatures of many of the States of the Union that they are "in accordance with the modern tendency to abolish the outmoded distinction between law and equity". It is clearly indefensible, however, to postulate either of the Constitution of the United States, or of any of the acts of the Congress of the United States relating to the ordination either of constitutional courts, or of legislative courts, or of courts of the District of Columbia, that therefrom there has been a contribution

[1] This work was published by The Michie Co., Charlottesville, Va., in 1930, several years before enactment of the statute that authorized the Federal Rules of Civil Procedure. It's 575(b) section is not only advocacy of the then pending proposal that the Congress authorize the judiciary to provide for procedural uniformity at law and in equity, to the maximum extent possible, but also advocacy of amendment of the Constitution to effect an effacement of its recognition of the distinctness between law and equity, even to the extent of committing to the discretion of the Congress the matter of trial by jury in civil cases.

to "the modern tendency to abolish the outmoded distinction between law and equity." Such "modern tendency" might properly be appraised as an aid or guide to the judicial judgment in the construction of a statute of a State creating a municipal court, if the State was one of the States in whose systems of jurisprudence there is no distinction between law and equity; but it most certainly is not a proper aid or guide to the judicial judgment in the construction of a statute of the Congress creating a Municipal Court for the District of Columbia, wherein, and perforce of acts of the Congress exclusively, there now is, and always has been, a system of jurisprudence in which law and equity have been distinct.

In the lower appellate court's resting of its decision upon the fallacious assumption that the aforesaid "modern tendency" under the governments of the States is also a "modern tendency" under the Government of the United States, there is a perfect example of the *petitio principii*. If the assumption were wholly true, not entirely false, that court's construction of the Consolidating Act, but in the light only of its text—certainly not in the light of its legislative history, to which reference is made hereinafter—might be invulnerable to attack, might be sound. This is so because, as that court says, and as the petitioners agree, "the term 'personal property' covers choses in action whether they are legal or equitable and the words 'civil actions' are generally held to cover both actions at law and actions in equity"; and, therefore, to assume as true (although it be as false as that innovative, if not subversive, doctrine which is now formally and officially taught in the executive department of the Federal Government, to wit, that the "constitutional doctrine of the separation of the powers of government has all but disappeared in the dim mists of the past"[2]), that legislation

[2] From an opinion of the Solicitor of the Department of Agriculture on the "difficulty" and the "problem" alleged by him to have been created by the reasoning of this

of the Congress creating courts and defining their jurisdiction "is in accordance with the modern tendency to abolish the outmoded distinction between law and equity", is necessarily to foreclose all question as to what the Congress intended by the use of the phrases "personal property" and "civil actions" in delimiting the jurisdiction of the Municipal Court for the District of Columbia; foreclosed because immanent in such an ungrounded assumption is the concession that by the use of the phrases "personal property" and "civil actions" the Congress intended to divest the District Court of the United States for the District of Columbia of a specific extent of equity jurisdiction and to displace the United States Court of Appeals for the District of Columbia as the first appellate court for the review of judgments or decrees entered in the exercise of such specific extent of equity jurisdiction.

Obviously false is the minor premise of that evident syllogism upon which the lower appellate court's decision rests, to wit:

> Major Premise: That the phrase, namely, "civil actions", means actions at law or actions in equity in every system of jurisprudence in which the distinctness between law and equity is "outmoded".
>
> Minor Premise: That the system of jurisprudence which the Congress has devised and maintained for the District of Columbia for over 140 years is one in which the distinctness between law and equity is "outmoded".
>
> Conclusion: Therefore, in investing the Municipal Court for the District of Columbia with jurisdiction

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Court in the Morgan Case, 298 U. S. 468; 304 Ib. 1; 307 Ib. 183. Said opinion is commented on in Monograph No. 11 (pp. 33, 37-42) of the Attorney General's Committee on Administrative Procedure, which is one of the 13 parts of Senate Document No. 186, 76th Congress, 3d Session. It is also the subject of a brochure of the Institute for the Orderly Development of American Administrative Law, Inc.

over "civil actions", the Congress irresistibly implied a purpose to invest that court with jurisdiction in equity "in addition" to jurisdiction at law.

The quality or grade of the reasoning of the lower appellate court is necessarily offered by this petition for analysis and assay by this Court.

CHAPTER II.

Absolute Repudiation of the Doctrine of International Exchange Bank v. Pullo and Sambataro v. Caffo, and a Consequent Overruling of Those Cases, Are Achieved by the Lower Appellate Court's Decision, Notwithstanding the Statement in Its Opinion That the Doctrine of Those Cases Is "Inapplicable" and, Therefore, That the Cases Are Distinguishable Doctrinally.

Surely the Statute Authorizing the Federal Civil Procedure Rules Is Not in Pari Materia With the Consolidating Act's 4th Section.

If the Federal Civil Procedure Rules constitute legislation that is *pari materia* with the legislation that created the Municipal Court for the District of Columbia, then the lower appellate court's construction of the Consolidating Act's 4th section is not wholly repudiatory of established judicial doctrine. If, however, such rules do not constitute such legislation then it is impossible to maintain the proposition that such construction is not in the teeth of such doctrine. Certainly there is no historical or other association or relation with respect to the Federal Rules of Civil Procedure and the Consolidating Act's 4th section. The former became effective several years before the effective date of the latter. The former pertain to "procedure in the district courts of the United States", not to the jurisdiction of those courts, and provide that they "shall not be construed to extend or limit the jurisdiction

of the district courts of the United States * * *." The latter pertains to the jurisdiction of a mongrel court, a unified police court and municipal court, not to procedure in such court, and very evidently does not explicitly provide that such jurisdiction shall be construed to limit the equity jurisdiction of the District Court of the United States for the District of Columbia. The subject of the aforesaid rules, therefore, is procedure exclusively, and procedure in district courts of the United States exclusively, while the subject of the aforesaid 4th section is jurisdiction exclusively, and the jurisdiction of a combined police court and municipal court. The two subjects are widely different in nature, and as foreign to each other for all the purposes of the instant case as if one concerned procedure in the Privy Council and the other related to the jurisdiction of a *piepoudre* court.

However, the lower appellate court decided that the Consolidating Act's 4th section does provide that it shall be construed to "limit" the equity jurisdiction of the District Court of the United States for the District of Columbia to causes in equity in excess of $3000.00 and to "extend" the jurisdiction of the Municipal Court for the District of Columbia beyond actions at law and into jurisdiction in equity over causes in equity that do not exceed $3000.00. And how did the lower appellate court reason to such a decision? It reasoned thereto by inferring from the mere presence of the words, to wit, "civil actions", as used in the aforesaid 4th section, and from the provision in the Federal Rules of Civil Procedure that a civil action shall be a term of description of "all suits of a civil nature whether cognizable as cases at law or in equity", that it was necessarily the legislative intent that the aforesaid 4th section should be construed to limit the equity jurisdiction of the aforesaid District Court and to extend the jurisdiction of the aforesaid Municipal Court.

Not unacceptable reasoning, provided the statute authorizing the aforesaid rules is in *pari materia* with the Con-

solidating Act's 4th section; but obviously a construction of the said section that is bottomed exclusively upon naught more than a judicial inference with respect to legislative intent under that section drawn from the mere presence therein of the words, to wit, "civil actions". Since it is manifest that the statute authorizing the aforesaid rules is not in *pari materia* with the Consolidating Act's 4th section, there remains for notice only this inquiry: What does such a judicial inference denote both logically and inevitably?

It denotes (1st) a judicial conviction that the 77th Congress intended, but impliedly only, that the provision in the Federal Civil Procedure Rules to the effect that the phrase, to wit, "civil actions", shall be a descriptive of "suits of a civil nature whether cognizable as cases at law or in equity", shall be determinative of the sense or meaning of the same phrase as used in the 4th section of the Consolidating Act; (2d) a judicial belief that the 77th Congress appraised the distinction between law and equity as something "outmoded" and hence intended, but impliedly only, by its use of the phrase, to wit, "civil actions", to invest the Municipal Court for the District of Columbia with jurisdiction in both equity and law; and (3d) a judicial construction of the Consolidating Act that is based, and based plainly and exclusively, upon an attribution to the 77th Congress of an implied intent to divest the District Court of the United States for the District of Columbia of a corresponding extent of jurisdiction in equity, and thereby to disrupt the system of jurisprudence in the District of Columbia.

The Doctrine That Has Been Actually Repudiated by the Lower Appellate Court.

This case is not the first in the lower appellate court in which it has exhibited extreme disesteem for the distinction between law and equity. It displayed such great de-

preciation in a welter of obiter in the opinion in *Rowe* v. *Colpoys*, — U. S. App. D. C. ——, 135 F. (2d) 249 (1943), which rank obiter is cited as authority in the lower appellate court's opinion in the instant case to the observation therein, to wit, "We have recently decided that in the enforcement of Municipal Court judgments the traditional distinction between law and equity need not be observed." Obviously it was not so "decided" in *Rowe* v. *Colpoys*, supra. However, there is in the opinion in that case a plethora of obiter directed against what is styled in that opinion as the "largely vestigial" character of the distinction between law and equity.

What in truth was "decided" in *Rowe* v. *Colpoys*, supra, was whether a license to sell alcoholic beverages issued by the Alcoholic Beverage Control Board of the District of Columbia was subject to levy under execution to satisfy a judgment at law of the Municipal Court of the District of Columbia, the predecessor of the Municipal Court for the District of Columbia. It was "decided" that it was subject to levy, but the sole predicate of the decision is the fact that the statute which authorized issue of the license also authorized a transfer of it, and that at common law a transferable license was subject to levy. And that this is indubitably so is incontestable from the lower appellate court's carefully studied statement of the only ground of its decision in *Rowe* v. *Colpoys, et al*, supra, to wit:

> "We conclude, therefore, that the rule of the common law which forbids a levy upon licenses, was confined, and should be confined to non-transferable licenses; that the reason for the rule fails in the case of a license which, by express statutory provision, is made subject to transfer; that, under the law of the District of Columbia the license involved in the present case was subject to levy."

The United States Court of Appeals for the District of Columbia is of very high rank in the system of Federal courts. Its jurisdiction is not appellate exclusively. It

has a very considerable extent of original jurisdiction over administrative decisions and orders of Federal departments, bureaus, commissions, and other agencies of the immense national bureaucracy in the Nation's Capital, in the exercise of which, as well as in the exercise of its appellate jurisdiction, questions of very grave concern in this so-called period of transition from an old to a new order are heard and determined by it. Many of its decisions are of national importance, not of local consequence only. It is fortunate or unfortunate, therefore, depending upon one's viewpoint governmentally, legally, judicially, politically, and otherwise that such court's attitude toward the distinction between law and equity in jurisprudence, Federal as well as local to the District of Columbia, is that which is evident from its characterizations of the distinction, as something "outmoded", as something "traditional", as something "largely vestigial". In the light of such an attitude it may well be expected that the said court would not be hospitable toward the doctrine of *International Exchange Bank* v. *Pullo*, 52 App. D. C. 199, 285 Fed. 933 (1922), and *Sambataro* v. *Caffo*, 57 App. D. C. 260, 20 F. (2d) 276 (1927), and would be quite likely to say of such doctrine, as it has said, that it is "inapplicable" in the instant case. But it is applicable, and unmistakably applicable, and the cases in which it is enunciated stand overruled despite the assertion in the lower appellate court's opinion that they are distinguishable.

International Exchange Bank v. *Pullo*, supra, is to the effect that the Act of April 19, 1920, 41 Stat. 569, permitting equitable defenses to be interposed in actions at law, was not intended by the Congress to be pertinent to such actions in the Municipal Court of the District of Columbia. It is also to the effect that an intention by the Congress to endow a court with jurisdiction in equity should be ascribed to it only when such intention is expressly declared by the Congress. In defense of its opinion the appellate court said:

> "We think, however, that * * * Congress did not intend thereby to enlarge the jurisdiction of the municipal court, by enabling it to entertain and enforce equitable pleas. * * * If Congress had intended to effect so radical a change in the jurisdiction of that court, it is reasonable to believe that the purpose would be expressed in more specific terms * * *. The true legislative intent manifestly was to simplify the practice as between legal and equitable procedure in those courts in the district which already possessed jurisdiction over equitable causes."

Sambataro v. *Caffo*, supra, is to the effect that the Act of March 4, 1923, 42 Stat. 1506, District of Columbia Code (1940) 13-214, permitting equitable defenses to be interposed in actions at law in the Municipal Court of the District of Columbia, was not an "attempt to clothe that court with general equitable jurisdiction" and that "while the defendant, in an action of ejectment [in that court], therefore might interpose an equitable defense, the court would be without jurisdiction to grant affirmative relief in the nature of a decree for specific performance." In its opinion the appellate court reiterated the doctrine of statutory construction that is applicable to a statute which is claimed to effect a distribution by the Congress of the judicial power of the United States in equity, doing so thus:

> "In *International Exchange Bank* v. *Pullo*, * * *, we ruled that the language of section 1535c, Code, did not disclose an intent on the part of Congress to enlarge the jurisdiction of the municipal court, because that court was without general equitable jurisdiction."

CHAPTER III.

The Consolidating Act Is a Pandora Box of Incongruities If Its 4th Section Indeed Means What the Lower Appellate Court Has Asserted That It Means.

AS WRITTEN BY THE 77TH CONGRESS, ALTHOUGH WRITTEN BY IT INARTIFICIALLY IN RESPECT TO ITS 4TH SECTION, THE ACT IS NOT DISCORDANT IN ITS PROVISIONS, BUT AS CONSTRUED BY THE LOWER APPELLATE COURT IT IS SELF-CONTRADICTORY IN MANY OF ITS PROVISIONS.

From the viewpoint of the petitioners, there has been what is in effect a judicial rewriting of the Consolidating Act's 4th section. And all that the petitioners set out herein stems from such a viewpoint. As *judicially* rewritten the pertinent or germane words in that section are these, to wit: "and in addition the said court shall have exclusive jurisdiction of cases at law or in equity", instead of the *legislatively* written words, to wit, "and in addition said court shall have jurisdiction of civil actions." As legislatively written, and if expounded in accordance (a) with universal judicial doctrine, (b) and in the light of the history of the Municipal Court, and (c) with the aid to judgment that is afforded by knowledge of the legislative history of the Consolidating Act, there are no incompatible provisions in the Act and perfect harmony exists among all its sections, sentences, clauses, phrases and words. But as judicially rewritten by the lower appellate court, i.e., as expounded (a) by a court which, as petitioners believe, is deceived by its assumption that legislation of the Congress relating to jurisprudence in the District of Columbia has tended to render "outmoded", has tended to render "traditional", and has tended to render "largely vestigial" the distinction between law and equity in that jurisprudence, (b) by a court acting under such a deception and evidencing that it does so by deeming certain universal judicial

doctrine in the matter of statutory construction "inapplicable", (c) by a court that regards the statute authorizing the Federal Rules of Civil Procedure as in *pari materia* with the Consolidating Act's 4th section, and (d) by a court that apparently puts out of sight all the legislative history of the Consolidating Act, that Act becomes replete with repugnancy and teems with inconsistencies. From the viewpoint of the petitioners, legislative orderliness, therefore, has been replaced by judicially created disorderliness. From the viewpoint of the petitioners the Consolidating Act has become a Pandora box of incongruities under the lower appellate court's construction of it.

Nullification of Expressly Declared Legislative Intent Through Judicial Misconstruction.

The Consolidating Act's 4th section provides that "the Court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the police court of the District of Columbia or by the Municipal Court of the District of Columbia or the judges thereof * * * and in addition the said Court shall have exclusive jurisdiction of civil actions * * * in which the claimed value does not exceed the sum of $3000.00." The "same powers and jurisdiction" could not possibly have meant "powers and jurisdiction" other than the "powers and jurisdiction" of judges and a court that functioned in the administration of justice in cases at law exclusively. If they were intended to mean something else, e.g., the "powers" and "jurisdiction" of a court wielding "powers" in equity and at law, and exercising jurisdiction in equity and at law, then the word "same" is not only an inept descriptive but a very misleading or false one, since the judges referred to had no "powers * * * heretofore" that were the "powers" of a Chancellor, and the court referred to had no "jurisdiction * * * heretofore" that was the jurisdiction of a court of equity.

The 77th Congress knew that the "powers" of the judges of the Municipal Court "heretofore" were only the powers of carrying into execution that court's "jurisdiction * * * heretofore", a jurisdiction which everyone concedes was a jurisdiction at law exclusively, not a jurisdiction in the exercise of which the sound discretion of the Chancellor is the controlling guide of judicial action, not a jurisdiction the exercise of which is a matter of grace and never an absolute right of a litigant. If the 77th Congress did not intend to perpetuate the "powers" of the judges and the "jurisdiction" of the Court as both "were heretofore had or exercised", then why did it so plainly and unmistakably declare such an intent? The lower appellate court asserts that the 77th Congress did not plainly and unmistakably declare such an intent.

The lower appellate court asserts that the 77th Congress implied a contrary intent, and bases the assertion upon nothing more than the presence of the phrase, to wit, "civil actions", in the following excerpt from the Consolidating Act's 4th section: "* * * and in addition the said court shall have exclusive jurisdiction of civil actions * * * in which the claimed value * * * does not exceed the sum of $3000.00". But such an assertion is a plain contradiction to what is explicitly declared in the Consolidating Act's 4th section, to wit, that both the "powers" and the "jurisdiction" of the court shall be "the same powers and jurisdiction as were heretofore had or exercised", i.e., they shall be only the character of "powers" and only the character of "jurisdiction" of a court that functions for the hearing and determination of actions at law exclusively. In that positive declaration by the 77th Congress there is a fixing, a freezing, of the character of the "powers" and of the character of the "jurisdiction" of the Municipal Court for the District of Columbia as "the same powers and jurisdiction as were heretofore had or exercised * * * by the Municipal Court of the District of Columbia." It is respectfully remarked that there is a judicial nullifi-

cation of that declaration under such a construction as the lower appellate court has made of the Consolidating Act's 4th section.

THE EVIDENT INEPTNESS OF THE FINAL DRAFTSMEN OF SECTION 4 OF THE CONSOLIDATING ACT HAS NEITHER WHOLLY OBSCURED THE REAL LEGISLATIVE INTENT NOR WARRANTED A JUDICIAL CONSTRUCTION UNDER WHICH SEVERAL OF THE ACT'S PROVISIONS ARE CONFUSING AND INCONSISTENT.

The whole 4th section of the Consolidating Act is a specimen of clumsily and awkwardly expressed legislative purpose. But while the architects of that Act were the Committees of the 77th Congress for the District of Columbia, not its Committees on the Judiciary, nevertheless, it is the belief of the petitioners that the former committees are not as deficient in skill as the architects of a consolidated police court and municipal court as is necessarily implied in and by the lower appellate court's construction of the Consolidating Act. As so implied, those committees were so inept as such architects as to provide for an equity jurisdiction for such a court pursuant to a general plan which on its very face provides for the continuation of an undiminished equity jurisdiction in the District Court of the United States for the District of Columbia.

As so implied, such architects, although designing for the Municipal Court an "exclusive jurisdiction" in equity of "civil actions * * * in which the claimed value * * * does not exceed the sum of $3000.00" also designed that the District Court of the United States for the District of Columbia should continue to exercise equity jurisdiction, even in cases in which any recovery in excess of $1000.00 would be apparently unjustifiable. The latter design of those architects is evident from the following excerpt from the 5th section of the Consolidating Act:

> "If, in any action, other than an action for equitable relief, pending on the effective date of this Act or hereafter commenced in the District Court of the United States for the District of Columbia, it shall appear to the satisfaction of the court at any pretrial hearing thereof that the action will not justify a judgment in excess of $1000.00, the court may certify such action to the Municipal Court for the District of Columbia for trial."

The aforesaid provision in the Consolidating Act's 5th section is indeed evidence of very inferior legislative craftsmanship, if the 77th Congress intended under the said Act's 4th section, as the lower appellate court has said it intended, to endow the Municipal Court with "exclusive jurisdiction" of equity causes up to $3000.00; for why create such "an exclusive jurisdiction" in equity and at the same time declare an exception of "an action for equitable relief" from the competence of the District Court to certify actions to the Municipal Court? Such exception is deserving of notice and discussion in the opinion of any court construing the Consolidating Act, but no notice whatever thereof, and hence no discussion whatever thereof, is discoverable at any place in the lower appellate court's opinion. But this is not the sole respect in which the lower appellate court's opinion is an exceedingly unsatisfactory construction of the Consolidating Act, an act in which there is no mention of equity or of equity jurisdiction, or of anything necessarily pertaining to equity or to equity jurisdiction, elsewhere than in the matter quoted above from that Act's 5th section.

Other provisions in the Consolidating Act were left unnoticed and, consequently, undiscussed in the lower appellate court's opinion. We advert here to some of them. In its section 4 (b) it is provided that "service of process in the civil division of the court shall be had as provided under existing law for the Municipal Court of the District of Columbia, or in such manner as may be prescribed by

rules of court." Such "existing law" made no provision for process in equity from such court. And such court has never "prescribed by rules of court" the "manner" of service of equity process. Rip Van Winkle slept longer than one year and seven months, but he never slept more profoundly than the Municipal Court has slumbered through a year and seven months with respect to that jurisdiction in equity which, if the lower appellate court's opinion is orthodox revelation, was bestowed upon it by the Consolidating Act.

In section 5 (b) it is demanded by the Congress that the Court's rules "shall conform as nearly as may be practicable to the * * * Federal Rules of Civil Procedure." Why "as nearly as may be practicable" if in virtue of the Consolidating Act the court is both a court of law and a court of equity? If such a court, the fact that only cases at law or in equity not in excess of $3000.00 are within its jurisdiction would not suffice to render impracticable conformity to any of the Federal Rules of Civil Procedure which are strictly procedural in character. If not such a court, but a court with a jurisdiction limited to cases at law, then, and of course, the words "as nearly as may be practicable" have an obvious significance, namely, "as nearly as may be practicable" with respect to cases in a court whose "jurisdiction", as declared in the 4th section of the Act, shall be only that "heretofore had or exercised." (Whatever may be the cogency of these statements it is a cogency with respect to the provision in section 9 (a) of the Act concerning procedure in the Municipal Court of Appeals for the District of Columbia.)

In section 7 (a) of the Consolidating Act it is provided that appeals may be taken from interlocutory orders "such as orders dissolving writs of attachment and the like." What does "and the like" mean? Does it mean what is meant by "and the like" as those words are used in District of Columbia Code (1940) 17-101, providing for special appeals from the District Court to the Court of Appeals

"from all interlocutory orders * * * such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like," or does it mean only processes at law of the "like" of attachments? If it means any equity process whatever, upon what rational ground can it be contended that it does? Would the ground be rational if it were solely the proposition that the doctrine of *ejusdem generis*, and the "traditional" sense of *noscitur sociis*, like the distinction between law and equity, are now completely "outmoded"? And if, clearly, it does not mean any equity process, then upon what rational ground can it be said that it was not the express intention of the 77th Congress that "the court and each judge thereof shall have and exercise" only "the same powers and jurisdiction as were heretofore had or exercised," but that it was the implied intention of that Congress that the court should have, "in addition", the "powers and jurisdiction" pertaining to the hearing and determination of causes in equity?

In section 7 (c) limitations are imposed upon the exercise of the judicial reason by the Municipal Court of Appeals for the District of Columbia in action by it on appeals from the Municipal Court for the District of Columbia in cases in which the trials below were "without a jury". The limitations are such that their inconsistency with the range or scope of appellate review in equity causes is obvious, at least to those members of the profession of the law who do not believe that the distinction between law and equity is "outmoded" either in lower or upper courts which the Congress has ordained or established. However, the limitations are entirely consistent with appellate review in law cases which had been tried "without a jury", in lower courts so ordained or established, i.e., have been tried therein by the judge functioning as a jury of one.

The limitations are stated in the statute thus: "* * * but in such case the judgment of the trial court shall not be set aside except for errors of law or unless it appears

that the judgment is plainly wrong or without evidence to support it." Congress has not yet "outmoded" the doctrine that in equity causes the judicial reason in appellate courts is at large on both law and fact, i.e., has a scope, sweep or area for the utterly independent and wholly free play thereof on both fact and law which is not a whit less than that of the judicial reason in the trial courts. Plainly, any appellate jurisdiction the exercise of which is subject to such limitations as those imposed by section 7 (c) is appellate jurisdiction over cases at law exclusively. Of course there is no real analogy between an imperative command of the Congress that administrative fact-finding shall be conclusive if supported by some or any substantial evidence, and the power of an appellate court to exercise the judicial reason unrestrainedly in reviewing the judgment of a lower court in an equity cause.

SOME OF THE SERIOUS CONSEQUENCES AND UNIQUE EFFECTS OF THE LOWER APPELLATE COURT'S CONCEPTION OF THE WORDS "IN ADDITION" AS NECESSARILY HAVING ONLY ONE DIMENSIONAL SIGNIFICANCE.

While the Consolidating Act's 4th section provides that "the court and each judge thereof shall have and exercise the same power and jurisdiction as were heretofore had or exercised", it declares that "in addition the said court shall have exclusive jurisdiction of civil actions * * * in which the claimed value * * * does not exceed the sum of $3000.00." If in lieu of the phrase, to wit, "civil actions", the 77th Congress had used the phrase, to wit, "civil cases", possibly it would not have occurred to the lower appellate court that the implied legislative intent was to effect an "addition" of equity jurisdiction to the "jurisdiction * * * heretofore had or exercised."

The "jurisdiction * * * heretofore had or exercised" was "exclusive jurisdiction in the following civil cases in which the claimed value * * * does not exceed $1000.00." Dis-

trict of Columbia Code (1940) 11-703. However, there is no difference in the sense or meaning as judicially defined or as defined otherwise of the phrases, to wit, "civil cases" and "civil actions". The former meant in the statute definitive of the old municipal court's jurisdiction exactly what the latter means in the statute definitive of the new court's jurisdiction. Both phrases are terms of description of litigation irrespective of whether determinable in accordance with the rules of law or the principles of equity.

The words "in addition" have a dimensional significance which might not have been apprehended by the lower appellate court. It has a dimensional significance of height as well as of breadth, of altitude as well as of width, of latitude as well as of longitude. Therefore, an "addition" to jurisdiction may be an "addition" vertically rather than horizontally, i.e., may be an "addition" thereto in the sense only of an increase of the "claimed value" or of the "sum" to which the jurisdiction "heretofore had or exercised" extended. That would depend upon the context in which the word "addition" is found. The lower appellate court has said that as found in the Consolidating Act's 4th section the word "addition" means that the 77th Congress did not add to the jurisdictional edifice of the Municipal Court by keeping within the metes and bounds of a jurisdiction at law, but added thereto by extending such edifice beyond those metes and bounds and thereby encroaching upon and invading some of the area upon which the jurisdictional edifice of the District Court of the United States for the District of Columbia had been constructed, i.e., that of such area upon which the latter court's equity jurisdiction rests. Stated otherwise, the lower appellate court has said that the word "addition" connotes not only subtraction from the jurisdiction at law of the said District Court but also subtraction from its jurisdiction in equity.

If all such judicial reasoning is flawless, then what ensues? If the District Court of the United States for the

District of Columbia has since the effective date of the Consolidating Act assumed to exercise finally any of that jurisdiction in equity of which it was divested by the Consolidating Act, then there are some purported judgments or decrees of that district court about which a question of their validity may well exist. If the United States Court of Appeals for the District of Columbia has since the effective date of the Consolidating Act assumed to exercise finally any of that appellate jurisdiction in equity causes the appellate jurisdiction over which the Consolidating Act vested in the Municipal Court of Appeals for the District of Columbia, then there are some affirmances or reversals by the first named appellate court about which a question as to their validity may well exist.

And if there are any causes in equity now pending in the aforesaid District Court over which it has no jurisdiction because divested thereof by the Consolidating Act, then such cases must be dismissed by that court. And in the future, when a citizen seeks to enjoin or otherwise subject to process out of equity any officer of the United States, such citizen must proceed in the Municipal Court for the District of Columbia and such officer must answer in that court, if the action involves personal property and the claim with respect to it does not exceed the sum of $3000.00. For example, there is now pending in such district court an action numbered on its docket as Civil Action 20,502, which was brought to establish and enforce an equitable lien to the extent of $2000.00 upon a fund in the custody of Treasury officials, to wit, moneys appropriated by the Congress for the payment of a judgment of the Court of Claims, and one of the petitioners here, namely, Robert F. Klepinger, is the plaintiff in such action and the respondent here, namely, Fred B. Rhodes, is a defendant thereto. That suit must be dismissed if the reasoning of the lower appellate court in the instant case is sound. Other serious consequences and other awkward effects could be recited, but what has been stated suffices to indicate to

this Court what is necessarily in the wake of the lower appellate court's opinion and judgment in the instant case.

CHAPTER IV.

Owing Either to Willfulness or to Ignorance, None of the Courts Concerned Has Ever Conformed Its Procedure to That Split of Equity Jurisdiction Which the Lower Appellate Court Has Said Was Made by the Consolidating Act, Nor Was Such Split Adverted to at the Judicial Circuit Conference of February 25-27, 1943.

July 1, 1942 is the effective date of the Consolidating Act. February 11, 1944, is the date of the decision of the lower appellate court in the instant case. A period of more than a year and seven months intervened, and intervened apparently without realization by the Municipal Court for the District of Columbia that it was an equity court (certainly without the promulgation by it of rules of procedure adapted to the exercise of an equity jurisdiction); apparently without awareness by the District Court of the United States for the District of Columbia that it had been divested of a specific extent of equity jurisdiction (certainly without the announcement of any rules of procedure that denote such an awareness); apparently without consciousness by the United States Court of Appeals for the District of Columbia that it had been displaced by the Municipal Court of Appeals for the District of Columbia as the court of first appellate jurisdiction over judgments or decrees in specific equity causes (certainly without any alteration in its general rules that displayed such consciousness); apparently without knowledge by the District of Columbia Bar of so vast a disruption in the system of local jurisprudence (certainly without any action by any of its committees, or by any of its alert and scholarly members that signified such knowledge).

The Judicial Circuit Conference, District of Columbia Circuit, was held February 25-27, 1943. It was the first such Conference held subsequent to the effective date of the Consolidating Act. The subject of that Act could not have been overlooked by the Conference without oversight by it of legislation consolidating two courts and creating another in the circuit since the last preceding Circuit Conference. Nor was it overlooked. However, while the subject of the Consolidating Act was not overlooked by the Conference, the report of the proceedings of the Conference denote an oversight by everyone who participated therein of what has been discovered in that Act by the lower appellate court, namely, an implied intent of the 77th Congress to split equity jurisdiction between two courts in the circuit, and to displace the highest court in the circuit as the court of first appellate jurisdiction over judgments or decrees in some equity causes.

Of the proceedings of the Conference were two addresses, the theme of each being the Consolidating Act, one delivered by the Chief Judge of the Municipal Court of Appeals—the tribunal which the Consolidating Act created—the other delivered by the Chief Judge of the Municipal Court for the District of Columbia—the tribunal which, in virtue of that Act, is a combined police court and municipal court. Neither of these two addresses nor any address delivered at the Conference, contains a glimmer of an indication that the person delivering it had discovered in the Consolidating Act what the lower appellate court has discovered therein. It won't do at all to say that the power, right, or duty to explore and to discover as to legislative intent was exclusively of the function of the lower appellate court. The Consolidating Act created such power, granted such right, and imposed such duty for exercise primarily by the Municipal Court for the District of Columbia, and did so in the mandatory direction to it to

prescribe rules of procedure in that court. And, presumably, if that court had explored for and had discovered an implied intent under the Consolidating Act to invest it with equity jurisdiction, its Chief Judge, in his address before the Conference, certainly would have announced the discovery. But he did not announce such a discovery, and all that he announced, and all that the Chief Judge of the Municipal Court of Appeals announced, was consistent only with one discovery by both, namely, that the Consolidating Act created a jurisdiction at law exclusively.

Since July 1, 1942, the Municipal Court for the District of Columbia has been under a clear mandate from the Congress which is contained in the 5th section of that Act, to wit: "That the Munipical Court for the District of Columbia * * * is hereby directed to prescribe * * * rules * * * and the same shall conform as nearly as may be practicable to the * * * procedure now obtaining under the Federal Rules of Civil Procedure." Such rules have not been prescribed. Such mandate has not been executed. The large and rapidly increasing population of the District of Columbia has been denied, without any apparent justifying cause for the denial, of whatever benefit to it Congress intended under that mandate to that court. The inordinate procrastination in carrying out the mandate is a matter for conjecture and there has been much conjecture concerning it.

Presumably the members of that court have not been sufficiently numerous since July 1, 1942, to sit in the court's several parts and also to engage in rule-making. Presumably also the members of that court have not procrastinated in the matter of obedience to the aforesaid mandate in any hope or any belief that either new legislation, or such a construction of the Consolidating Act as has been made in the instant case by the lower appellate court, would eventually enable the Municipal Court for the District of Columbia to exercise equity jurisdiction in addition to jurisdiction at law. Such presump-

tion should obtain notwithstanding that the legislative history of the Consolidating Act discloses that a miscellany of persons, including notables among the District of Columbia judiciary and the bar of that district, were very keenly disappointed by the failure of the 77th Congress to expressly, unmistakably, and forthrightly strip the District Court of some of its equity jurisdiction for the clothing therewith, for the aggrandizement of, a consolidated Police Court and Municipal Court.

The best traditions of the American judiciary—and municipal courts are of the American judiciary—afford no warrant for an intimation that a court's inaction, even when very greatly protracted and depriving a very large community of the benefit of the court's own opinion or views as to the nature and extent of its jurisdiction, is so protracted for the attainment of ulterior purposes. Hence it is not intended to be intimated here that a year and seven months have elapsed without a yielding of obedience by the Municipal Court for the District of Columbia to the aforesaid mandate to it from the Congress, solely because that court had hoped that it would be enabled, under the sanction either of amendatory legislation or of such a construction of the Consolidating Act by a superior court as has been made by the lower appellate court, to promulgate rules governing procedure before it "in all suits of a civil nature whether cognizable as cases at law or in equity" (as is said in the first of the Federal Rules of Civil Procedure), in the exercise by it of "exclusive jurisdiction of civil actions * * * in which the claimed value of personal property * * * does not exceed the sum of $3000.00" (as is said in the 4th section of the Consolidating Act).

The fact is, however, that the Municipal Court although being under a positive duty for more than a year and seven months to do so, has not yet prescribed rules that "shall conform as nearly as may be practicable to the * * * Federal Rules of Civil Procedure," and, therefore,

has not yet, through the process of rule-making, asserted that the Consolidating Act's 4th section vested in it an equity jurisdiction and thereby divested the District Court of an equal extent of such jurisdiction. No court, not even a very inferior one in the system of American courts, should be so shy or modest as to be reluctant to construe the statute of its creation. Every court has both a right and an obligation to exercise jurisdiction to determine its jurisdiction, *a fortiori* when the right and the obligation are contained in an explicit command to it from the law-making body to frame such rules of procedure which, when framed and promulgated, would necessarily be annunciative of the court's opinion or views on the nature and extent of its jurisdiction. The 77th Congress certainly did not grant to the Municipal Court a power of discretion to delay the promulgation of its rules until some court superior to it, as, for instance, the lower appellate court, had declared what was the nature and extent of the Municipal Court's jurisdiction.

The argumentative value here of the foregoing observations—their relevancy or pertinence—is patent. So far as they relate to the Municipal Court's failure in the matter of rule-making, they call attention to a circumstance not inconsistent with a wide divergence of views among the members of that court on the matter of the nature and extent of its jurisdiction, a disagreement among its members as to whether equity jurisdiction as well as jurisdiction at law exists in that court. Such a disagreement might well be the sole cause of the non-appearance after more than a year and seven months of rules conforming "as nearly as may be practicable to the * * * Federal Rules of Civil Procedure." There must be some cause for the exceedingly long inaction, and certainly such a cause constitutes at least an attenuated apology for the seemingly interminable delay if there exists no manifest justification. So far as the foregoing observations relate to the lower appellate court, the District

Court, the District of Columbia Bar, and the strange silence at the Judicial Circuit Conference, on so momentous a matter as a split of equity jurisdiction between the District Court and the Municipal Court, they call attention to a seeming general concurrence of opinion among District of Columbia judges and lawyers that the 77th Congress had not, impliedly or otherwise, detracted from the equity jurisdiction of the District Court in order to bedizen a consolidated Police Court and Municipal Court with equity jurisdiction.

CHAPTER V.

The Legislative History of the Consolidating Statute Refutes the Lower Appellate Court's Assertion That the 77th Congress Purposed Divesting the District Court of a Specific Extent of Equity Jurisdiction and Investing the Municipal Court With It.

IF THE CONSOLIDATING ACT BESPEAKS A LEGISLATIVE DESIGN SUCH AS IS ASCRIBED TO IT BY THE LOWER APPELLATE COURT, THE BILL IN WHICH IT ORIGINATED VERY PROBABLY WOULD HAVE BEEN CONSIDERED BY THE COMMITTEES OF THE 77TH CONGRESS ON THE JUDICIARY AND NOT BY ITS COMMITTEES FOR THE DISTRICT OF COLUMBIA.

The Consolidating Act is an enactment of H.R.5784, 77th Congress. Hearings on that bill and others of similar import were held before subcommittees of the House and Senate Committees for the District of Columbia. Such hearings were not reported in the sense of being printed. The evidence of them consists in sundry typewritten documents including many letters from individuals. None of such evidence, none of the contents of any committee report on the bill, and nothing in the Congressional Record's report of the debate on H.R.5784 denotes apprehension either

by anyone who participated in the hearings or by any member of the 77th Congress that among the objectives of the bill, or of any bill of similar import, was (1st) a deprivation of the United States District Court for the District of Columbia of some of its equity jurisdiction, (2d) endowment of the Municipal Court for the said District with it, and (3d) a supplantation of the United States Court of Appeals for the District of Columbia by a Municipal Court of Appeals for the said District as the tribunal of first appellate jurisdiction over cases within such equity jurisdiction.

Would not the Committees of the Senate and the House on the Judiciary, not the Committees thereof for the District of Columbia, have taken cognizance of H.R.5784 and the companion bills if any member of either body supposed that any of the bills provided for such a subtraction from the original jurisdiction of one constitutional court of the United States and for such a supersession of another constitutional court of the United States?

What the Chief Justice of the Lower Appellate Court Recommended to the Committees of the Congress.

The Chief Justice of the United States Court of Appeals for the District of Columbia, who is one of the three justices of that court who concurred in its opinion in the instant case, participated in the aforesaid hearings. He was the source of the most constructive of the contributions made to the hearings. The following is part of his statement of July 31, 1941, before a subcommittee of the House Committee for the District of Columbia:

> "One objective is to increase the jurisdiction *in amount.* * * * By the increase *in the amount* of jurisdiction which the new court would have it is believed that a great many cases which now necessarily are brought in the United States District Court would be

> brought in the new court. * * * I infinitely prefer that the jurisdiction be established at $3000.00." (Italics supplied)

This is not the language which the Chief Justice of the United States Court of Appeals for the District of Columbia would be likely to use in advocacy by him of a proposal to subtract from the equity jurisdiction of the District Court of the United States for the District of Columbia and to displace his own court as the tribunal of first appellate jurisdiction over cases within the scope of the subtracted equity jurisdiction. He was not recommending that the new municipal court be given equity jurisdiction "in addition" to jurisdiction at law. He said that his advocacy was restricted to an "increase of the jurisdiction in amount". To what "jurisdiction" was he referring? To the "jurisdiction" of the then existing Municipal Court of the District of Columbia, of course; and that "jurisdiction", as he knew, was "jurisdiction" at law exclusively. That the Committee deduced that he was so referring, is obvious from the terms of the Committee's report, to which reference is made hereinafter. If a man of the Chief Justice's mental caliber had advocated a dual "jurisdiction", i.e., a jurisdiction at law and "in addition" a jurisdiction in equity, he would not have said, and said twice, that what he sought was only an "increase in the amount of the jurisdiction" of the then existing Municipal Court of the District of Columbia.

It seems that several months after the said Chief Justice had so expressed himself to the Congressional Committees, as aforesaid, there came to his notice a reported disposition by the then Chairman of the Senate Committee for the District of Columbia to invest the then proposed Municipal Court for the District of Columbia with that equity jurisdiction of the United States District Court for that District which is exercised in domestic relations cases. On November 18, 1941, the Chief Justice wrote to the said Chairman saying:

> "I have been greatly interested in statements which I have seen attributed to you from time to time on the subject of relieving the United States District Court of its jurisdiction in domestic relations cases. I have frequently thought along the same line, and am heartily in favor of the idea. * * * but I think the important thing now is to get the bill consolidating the municipal and police courts enacted into law."

This statement by the Chief Justice and his earlier statement to a Congressional committee certainly do not show him to have been a champion before the 77th Congress of equity jurisdiction for the Municipal Court for the District of Columbia.

AN ASSOCIATE JUSTICE OF THE LOWER APPELLATE COURT ALSO PARTICIPATED IN THE CONGRESSIONAL HEARINGS.

The Chief Justice is not the only member of his Court who participated in the aforesaid legislative hearings, and who concurred in the opinion of the Chief Justice's court in the instant case. The testimony of the Associate Justice before the committee, however, is without allusion to any matter or thing of the remotest pertinence here. If he believed that the bill purposed creating an equity jurisdiction for the Municipal Court for the District of Columbia, such belief is not apparent in any statement he made to the Committee. However, as late as March 15, 1943, many months subsequent to the effective date of the Consolidating Act, it was his confessed belief that two cases in his court, to wit, *Sambataro* v. *Caffo*, 57 App. D. C. 260, 261, 20 F. (2d) 276, 277, and *International Exchange Bank* v. *Pullo*, 52 App. D. C. 199, 201, 285 F. 933, 935, which his court's opinion in the instant case declared to be "inapplicable since the statute under which those cases were decided did not vest jurisdiction in civil actions generally, but only in specified types of civil actions", were

enunciative of judicial doctrine in the matter of statutory construction that still was applicable with respect to legislation of the Congress pertaining to the jurisdiction not only of the old municipal court but also of the now existing municipal court.

This is plain from the fact that such Associate Justice is the writer of the opinion in *Howenstein Realty Corporation* v. *Robertson, et al.*, 77 App. D. C. 299, 135 F (2d) 803, decided March 15, 1943, in which opinion *Sambataro* v. *Caffo, supra*, and *International Exchange Bank* v. *Pullo, supra*, are cited as authorities for an admonition rather than a judicial conclusion that is made in such opinion. Sound judicial doctrine in the matter of construction of statutes affecting the jurisdiction of courts in the District of Columbia was observed or followed by this Associate Justice as the author of the lower court's opinion in the *Howenstein* case, supra, but was put out of sight and departed from by him as one of the three Justices concurring in the opinion of his court in the instant case. This for the reason that the opinions in the *Sambataro* and *International Exchange Bank* cases, supra, expressly disapprove the imputation to the Congress of an implied intent to split between two courts a jurisdiction in equity, while the opinion in the instant case is necessarily grounded exclusively upon an imputation to the Congress of just such an implied intent.

The aforesaid admonition rather than judicial conclusion in the opinion in the *Howenstein* case, supra, was prompted by suggestions of counsel in the lower appellate court that, possibly, there were equitable defenses to the action for damages resulting from alleged nonperformance under a contract for the sale and purchase of real property. The admonition with respect to the making of such defenses in the Municipal Court is made very circumspectly, very cautiously and, it may properly be added, also very cloudily, for it is made thus:

> "This contention suggests considerations appropriate to a suit in equity for reformation or rescission of an instrument, or conversely, for specific performance. Again no such issue was presented in the trial court. Moreover, unless such issues were presented by way of defense, the Municipal Court would be without jurisdiction to try them. Perhaps, in a competent court, upon pleadings properly drawn, evidence to vary the terms of the contract or of the deed may become admissible under the rule previously stated.
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> * * *
>
> "* * * If it involved title to real property, presumably, the Municipal Court would be without jurisdiction to try it."

That in the *Howenstein* case, supra, the lower appellate court was admonishing on March 15, 1943, as to equity in respect of real property, not equity in respect of personal property, and equity in respect of the Municipal Court, not equity in respect of the District Court, has nothing whatever to do with the fact that in that case, and as late as March 15, 1943, the lower appellate court's admonishment was this, to wit: That *Sambataro* v. *Caffo*, supra, and *International Exchange Bank* v. *Pullo*, supra, still were throbbing, living, controlling authorities in the matter of the construction of statutes of the Congress relating to the nature and extent of the jurisdiction of the Municipal Court for the District of Columbia.

What the Senate Committee for the District of Columbia Recommended to the Senate in the Report on the Bill.

That the Senate Committee understood the Chief Justice to refer to the jurisdiction of the then existing Municipal Court of the District of Columbia when he stated that "one objective is to increase the jurisdiction in amount", and that said Committee understood that H.R.5784 would affect

no jurisdiction other than the jurisdiction at law which was then exercised by that court, is duly established by the following passage in the Senate Committee's report of that bill to the Senate (S. Rep. 1116):

> "VIII. *It increases the jurisdiction of the present municipal court* (which would be the civil branch of the new court) to $3000.00. This should substantially lighten the burden of the United States District Court, by relieving it of non-Federal or purely local litigation which in the past has constituted more than 1/3 *of the verdicts* returned in the district court. (It was further represented to the committee that 75 per cent of all settlements effected in the United States district court have been for amounts less than $1000.00)." (Italics supplied)

So, while the Senate Committee said,—and said in line with what the Chief Justice said,—to wit, that the bill "increases the jurisdiction of the present Municipal Court", and hence increases jurisdiction only at law, and thereby operates to transfer from the District Court to the Municipal Court cases in which "verdicts" are rendered, i.e., actions at law, nevertheless the Chief Justice's court now says, with the Chief Justice concurring, that the bill provided for a dual jurisdiction for the latter court, a jurisdiction at law and in equity, and, accordingly transfers equity cases as well as law cases from the former to the latter court.

What the Gentleman Who Is Now Chief Judge of the Municipal Court of Appeals for the District of Columbia Recommended to the Committees of the Congress.

The present Chief Judge of the Municipal Court of Appeals, a tribunal created by the Consolidating Act, was in private life and engaged in the practice of the law in the District of Columbia when H.R.5784 was pending in the

77th Congress. His interest in that bill admits of description under three heads, to wit, design, disappointment, depreciation. His design is disclosed in his statement before a subcommittee of the House Committee, made on July 29, 1941. It was to take from the District Court for the District of Columbia all such jurisdiction, law, equity, or what not, that would be necessary to achieve uniformity in the matter of its jurisdiction with that of the jurisdiction of district courts of the United States in the States. He said: "I think the bill is not sufficiently constructive and I want to make these suggestions for the committee to consider. * * * if we could have a jurisdiction of our District Court conforming to the jurisdiction of District Courts through the United States, * * * I think that the best results for all concerned, would eventuate."

Such Chief Judge's disappointment was expressed in a letter he wrote on February 24, 1942, which was submitted to the Committee. Therein it is stated:

> "I have examined the provisions of H.R.5784 affecting local courts as rewritten and reported yesterday by the Senate Committee."

He had examined, therefore, S. Rep. 1116 in which it is said, with respect to the jurisdiction for which the said bill provided, that "It increases the jurisdiction of the present municipal court" but only in cases in which "verdicts" are rendered. His reaction to that was expressed by him thus:

> "I had hoped it would be possible to reorganize our local judiciary along broader lines, as I indicated in my statement before the House Committee. Our District Court has been overloaded with local cases including foreclosures of liens on personal property in excess of $50.00 valuation, cases affecting domestic relations, etc., which might well be handled by a court not burdened with many cases of public importance."

Possibly such Chief Judge would rate as a case of no "public importance" one in which an injunction to the Secretary of the Treasury and the Treasurer of the United States is necessary in aid of an action to establish and enforce an equitable lien to the extent of, e.g., $2000.00, upon personal property of an individual in the custody of Treasury officials. Such a case (Civil Action 20,502) is pending in the United States District Court for the District of Columbia at the time of preparation of this petition for certiorari. It should be dismissed for want of jurisdiction in equity and relegated to the Municipal Court for the District of Columbia if the ratiocinative process of the appellate court below in this case is flawless.

Such Chief Judge's depreciation of the Municipal Court for the District of Columbia, as provided for in H.R.5784 as reported to the Senate, was expressed by him in his letter of March 2, 1942, to the then Chairman of the Senate Committee for the District of Columbia thus:

> "In re H.R.5784 (Municipal Court Bill) * * * it seems obvious that an inferior court handling largely small claims, landlord and tenant proceedings and police matters should be presided over by judges whose vital interest is in the civil and economic welfare of this jurisdiction and whose interest in that respect is not divided."

And it so seemed to the appointing power, for the writer of the aforesaid letter was subsequently appointed to the Chief Judgeship of a court that is competent to chasten the Municipal Court if the "civic and economic welfare of this jurisdiction" ever ceases to be a "vital interest" of the judges of the latter court.

A MAJORITY OF THE DISTRICT OF COLUMBIA BAR DISAPPROVED THE PROPOSAL TO INCLUDE IN THE BILL A PROVISION INVESTING THE MUNICIPAL COURT WITH EQUITY JURISDICTION AND THE MINORITY CONCLUDED "IT WOULD BE JUST AS WELL TO OMIT IT NOW."

One of the best legal minds of the District of Columbia Bar authored the following statement before the subcommittee of the Senate Committee on the District of Columbia, on September 10, 1941:

> "My own views are—so far as the jurisdiction of the new court is concerned—that it should not be exclusive of equity jurisdiction. * * * The committee of which I am a member [the District of Columbia Bar Association Committee on the Relation of the Bar to the Courts] has not adopted that point of view. * * * It would be just as well to omit it now. * * * ."

Undoubtedly the majority of the bar of the District of Columbia believed that the 77th Congress had concluded "to omit it now", and undoubtedly the draftsmen of S. Rep. 1116, 77th Congress, supposed that the language used in that report was expressive of a determination of the Senate Committee for the District of Columbia "to omit it now."

CONCLUSION.

Not Precisely an Abdication of Appellate Jurisdiction by the Lower Appellate Court, Nor Exactly an Ouster by It of the Original Jurisdiction of the Lower District Court, But Clearly and Truly a Misconception of the Will of the Congress As to the Extent of the Jurisdiction Which Each Court Shall Exercise.

Only a very deeply rooted conviction could have vindicated a minority of this Court in saying, in dissent from

its judgments in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Co.* (310 U. S. 573 and 311 U. S. 570), that "upon the allegations of the bill, the District Court had jurisdiction"; that "technical and difficult questions" in each of the cases "could not justify the court's abdicating its jurisdiction to test the Commission's order", and that the opinion of the Court in each of the cases "announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established".

Also very deeply rooted is the conviction of the attorney for the petitioners in the instant case that upon the allegations of the complaint therein "a cause for relief in the nature of equity" is stated; that the District Court's conclusion to the contrary, although not an abdication of its jurisdiction in equity, was an erroneous denial of equitable relief to the petitioners; that the lower appellate court has announced principles with respect to the construction of a statute pertaining to judicial jurisdiction that are directly contrary to those which have been established; and that the said court's construction of the Consolidating Act pursuant to such principles, while not the same as an abdication of a specific extent of that court's appellate jurisdiction nor the same as an ouster by it of the lower district court of a specific extent of its original jurisdiction, nevertheless is operative, until disapproved by this Court, to thwart the will of the Congress as to the extent of the appellate jurisdiction which the lower appellate court shall exercise and the extent of the original jurisdiction which the lower district court shall exercise.

I. Congress has never made a contribution to "the modern tendency to abolish the outmoded distinction between law and equity" in legislation relating to courts in the District of Columbia and their jurisdiction.

II. The distinction between law and equity in Federal jurisprudence generally, and in the jurisprudence of the District of Columbia particularly, is not "outmoded", is not merely "traditional", is not "largely vestigial."

III. In explicitly declaring that the Municipal Court for the District of Columbia and its judges shall have only "the same powers and jurisdiction as were heretofore had or exercised * * * by the Municipal Court of the District of Columbia", the 77th Congress meant that the new court should have jurisdiction at law exclusively.

IV. In providing that "in addition the said court shall have exclusive jurisdiction of civil actions * * * in which the claimed value * * * does not exceed the sum of $3000.00," the 77th Congress meant to affect jurisdiction only by adding thereto actions at law not within the jurisdiction of the old court, i.e., actions at law for a recovery of more than $1000.00 but not in excess of $3000.00.

V. The phrase, to wit, "civil actions," as used in defining the jurisdiction of the new Municipal Court is not in any relevant sense different from the meaning of the phrase, to wit, "civil cases", as used in the statute that defined the jurisdiction of the old Municipal Court and limited it to "civil cases" in which the claimed value did not exceed $1000.00.

VI. The statute authorizing the Federal Rules of Civil Procedure is not in *pari materia* with the Act consolidating the Police Court and Municipal Court of the District of Columbia.

VII. The Consolidating Act's provisions generally are consistent only with a construction of the Act as one that created a jurisdiction at law exclusively and clearly negative the construction placed upon the Act by the lower appellate Court, namely, a construction under which it was intended, but impliedly only, to be creative of jurisdiction in equity "in addition" to jurisdiction at law.

VIII. The legislative history of the Consolidating Act proves beyond any reasonable doubt that the lower appellate court has imputed to the 77th Congress a design or purpose which that Congress did not contemplate.

IX. The lower appellate court's construction of the Consolidating Act has been made in repudiation by that court of universal judicial doctrine in the matter of construction of statutes which are claimed or contended to evidence a legislative intent to disrupt an existing system of jurisprudence by divesting one court of equity jurisdiction, investing another therewith, and displacing an appellate court as the first court of appellate review of judgments in certain causes in equity.

X. Resting, as it does, entirely upon an inference that the 77th Congress impliedly, but only impliedly, intended to disrupt jurisprudence in the District of Columbia by investing the Municipal Court with jurisdiction in equity and divesting the District Court of a corresponding quantum of jurisdiction in equity, and such inference being untenable in the light of the provisions of the Consolidating Act generally, the lower appellate court's opinion is an insupportable judicial deliverance.

The foregoing several propositions should be explicitly sustained by this Court in an early opinion by it supportive of a judgment reversing the judgment of the lower appellate court.

Respectfully submitted,

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Attorney for Petitioners.

APR 18 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

No. 809.

ROBERT F. KLEPINGER, *et al., Petitioners,*

vs.

FRED B. RHODES, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 809.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI.

Certiorari should be denied, for

(1) The decision relates to a matter of well established and fundamental law.

(2) The decision relates to a matter of local law of the District of Columbia.

(3) The decision is consistent with the decisions of this Court and correct.

(4) The case is moot.

The Proceedings on Which the Decision is Based.

Plaintiffs' suit in the District Court of the United States claimed $1,980.00. They charged the defendant upon a promise that when that amount came into his hands from fees earned by him in the prosecution of claims in the Court of Claims, he should hold it in trust for the plaintiffs and charged with a lien in favor of the plaintiffs. Defendant received the stated amount but refused, conditionally, plaintiffs' demand for performance of the trust and discharge of the lien. Plaintiffs demanded "appro-

priate process to the defendant requiring discharge or performance by him of the obligation of his trust" * * * "or, but only if such process is unavailing to effectuate such discharge or performance" for a money judgment.

Section 11-306, District of Columbia Code, 1940, grants to the District Court of the United States for the District of Columbia, cognizance of all cases in law and equity between the parties, R.S.D.C. sec. 763; Feb. 27, 1877, 19 Stat. 253, Ch. 69 sec. 2).

Section 11-755, District of Columbia Code, 1940, (Supp. 1943) established the Municipal Court for the District of Columbia and vested in that Court exclusive jurisdiction of civil actions in which the debt claimed does not exceed $3,000.00. (Act of April 1, 1942, 56 Stat. 192, Ch. 207).

The Court dismissed the action because the complaint failed to state a cause for relief in the nature of equity.

The Principles Involved Are Fundamental.

Plaintiffs sought relief in equity because of the lack of a perfect legal remedy. In other words, their remedy at law was not plain, adequate and complete. Whether plaintiffs were consistent in seeking the aid of a court of equity is doubtful, for they pray in the alternative for a money judgment.

Nevertheless, the Court acts *in personam* and not *in rem*. The fund which came into the hands of the respondent is gone. There is no *res*. Therefore, the Chancellor's only method of enforcing the decree is by coercing the defendant's obedience by imprisonment for contempt. That is, he can only put the defendant in jail and keep him there until he shall obey. In the Trial Court, this was the ap-

parent situation, the motive of the plaintiffs was clear, and the complaint was properly dismissed, but only on the grounds that the complaint failed to state a cause for relief in the nature of equity. And this was the sole question in the United States Court of Appeals for the District of Columbia. The action of the Trial Court was affirmed.

Did the Act Establishing the Municipal Court for the District of Columbia Confer Upon It Equitable Jurisdiction.

The opinion of the Court below on the question of equitable jurisdiction of the Municipal Court for the District of Columbia was not necessary to a decision of the case. The petitioner contends, apparently, that the action, or the failure to act, of the courts whose jurisdiction was affected by the act, is indicative of or points to an interpretation of the act. However, it is not what has been done under the statute, but what may or can be done, that is controlling.

Petitioner's statements that a period of more than a year and seven months intervened without realization by the Municipal Court for the District of Columbia that it was an equity court (certainly without the promulgation by it of rules of procedure adapted to the exercise of equitable jurisdiction), is, at least, a statement without foundation in fact.

Immediately upon the confirmation of the Chief Judge of the Municipal Court for the District of Columbia, that official forthwith entered upon his duty of promulgating rules of procedure under the mandate of the act. A committee of judges of that court was appointed by the Chief Judge to study the matter and promulgate a set of rules.

The Chief Judge invited a committee of lawyers to likewise make a study and advise the Court. Over the intervening period the committees met on numerous occasions, and on some occasion met together. No less than three completed drafts were prepared. The Chief Judge, anxious that the proposed rules have the consideration of all interested parties, has at this writing called a public meeting for the near future at which the final draft is to be proposed and the consideration of all interested groups invited.

It is true that the committees, in studying the proposed rules, and in following the mandate of the act that the Federal rules of Civil Procedure be applied to the new court as far as practicable, considered the extent of the equitable jurisdiction of the new court. The determination of the committees as to whether such application was or was not intended by the act, throws no light on its interpretation or meaning. There were many problems confronting the drafters of the rules:

First, the Municipal Court in its organization was unlike the District Court in many respects. The Municipal Court disposes of more cases in a single day than the District Court has to consider over a period of months. In addition to the regular business of the Court, there are separate branches handling small claims and landlord and tenant matters. The regular business too is classified; cases under $500.00 receiving special treatment because technical rules of pleadings are not required. The time fixed for the return of the summons is computed from the day of filing of the suit; in the District Court, from the day of the service of process. In the Municipal Court cases may be tried and disposed of on the return day; there is no set calendar. Such considerations could not be overlooked in conforming the Federal Rules to the Municipal Court.

Second, the Municipal Court does not have the machinery to handle the many types of cases falling within the jurisdiction of the District Court. The Municipal Court has not the adjuncts such as the Auditor, the Domestic Relations Commissioner, the Motion's Commissioner, and other aides. There is no provision for the appointment of receivers, trustees and the like.

Third, there are many statutes of the United States wholly inapplicable to the Municipal Court, the application of which are provided for in the Federal Rules. So, too, there were special provisions governing procedure in District Courts where the large territory covered by the court's jurisdiction required such rules, such as the service of process, personally and by mail, taking of depositions and the like, a situation not contemplated for a District of Columbia Court whose jurisdiction is confined to the "ten-mile-square."

Therefore, it was a serious consideration of the foregoing problems that consumed the time in promulgating the rules of practice and procedure for the Municipal Court, and not because any doubt existed in the minds of lawyers or judges as to applicability of equity.

If It Is the Intention of the Legislature to Confer Jurisdiction, Lack of Machinery Is No Bar.

If it was the intent of the Legislature to confer jurisdiction upon the Municipal Court for the District of Columbia of civil actions, in their nature equitable, the lack of machinery is no bar especially since "the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities, and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances." Apparently, the

Congress is following out a plan for the organization of the courts of the District of Columbia not only to attain the goal sought, but to meet a need of the future in the administration of law in the District of Columbia.

Conclusion.

Finally, it is submitted that the decision of the court below was correctly based upon considerations affecting fundamental and well-established principles of law, and the petition for certiorari should therefore be denied. The Court's attention should also be invited to the fact that the matter involved herein is the subject of a compromise settlement involving other matters between the parties, and that the case here is, therefore, moot.

Respectfully submitted,

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Office - Supreme Court, U. S.
APR 25 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term 1943

No. 809

ROBERT F. KLEPINGER, MIRIAM KLEPINGER, AARON W. KLEPINGER, WARREN P. KLEPINGER, AND GEORGE F. EVANSON,

Petitioners,

v.

FRED B. RHODES,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term 1943

No. 809

ROBERT F. KLEPINGER, MIRIAM KLEPINGER, AARON W. KLEPINGER, WARREN P. KLEPINGER, AND GEORGE F. EVANSON,

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v.

FRED B. RHODES,

Respondent.

PETITIONERS' REPLY BRIEF

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

At page 1 of Respondent's brief it is stated:

"(4) The case is moot."

At page 6 thereof, in the "Conclusion", it is stated:

> "The Court's attention should also be invited to the fact that the matter involved herein is the subject of a compromise settlement involving other matters between the parties and that the case here is, therefore, moot."

Obviously, the attorney for petitioners cannot allow those statements to stand unanswered.

This cause is not moot, and representations to that effect by the respondent-attorney through his counsel are untrue.

At page 2 of Respondent's brief, there is a reference to the specific fund out of which the Respondent had promised and engaged to pay $1980 in discharge of his admitted obligation to the petitioners. (R. 8, 9.) Such reference is this: "The fund which came into the hands of the respondent is gone. There is no res." But in the petitioners' complaint it is alleged,—and Respondent's motion to dismiss admits the allegation for all the purposes of this litigation,—that the Respondent represented that

> "*He had in his possession* as a part of such fee the sum of $1980 and purposed and intended to disburse it as provided in said assignment, but stated that he would retain it in his possession, until the said Robert F. Klepinger had fulfilled conditions as follows" etc. (R. 10, 12.)

Respondent is now trying to answer the complaint by his brief in this Court. Or is he testifying in this Court by proxy,—by his attorney, who is responsible to this Court for the factual representations made in Respondent's brief? Moreover, Respondent has the temerity to say at pages 2 and 3 of his brief that "In the Trial Court, this was the apparent situation", (i.e., that it was apparent to the trial court that 'The fund which came into the hands of the respondent is gone. There is no res.') He implies that the trial court adjudged the case in disregard of the facts alleged in the complaint which he had admitted for all the purposes of a hearing and determination in the trial court.

In other words, Respondent told the trial court that he had the trust fund. He asserts now in this Court that it "is gone."

Petitioners forbear from further comments on the contents of Respondent's brief in the conviction that this Court will

> Order Respondent to prove his repeated representation to this Court that "The case is moot", or retract it, and, in default of either,
>
> Issue such order as will appropriately discipline or censure for abuse of the right of a respondent to a petition for certiorari to file a brief in opposition.

Wantonly or recklessly made charges that this Court has been petitioned to hear and determine a moot case should neither be ignored nor condoned.

Respectfully submitted,

PATRICK H. LOUGHRAN,
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Washington 6, D. C.,
Attorney for Petitioners.

(21)

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FILED
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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 809.

ROBERT F. KLEPINGER, MIRIAM KLEPINGER, AARON W. KLEPINGER, WARREN P. KLEPINGER AND GEORGE F. EVANSON, *Petitioners,*

v.

FRED B. RHODES, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF AMICI CURIAE.

LAWRENCE KOENIGSBERGER,
Chairman,

HUGH H. OBEAR,
PAUL B. CROMELIN,
JOHN J. CARMODY,
Committee of the Bar Association of the District of Columbia.

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IN THE

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v.

FRED B. RHODES, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF AMICI CURIAE.

I.

This brief is filed by Lawrence Koenigsberger, Hugh H. Obear, Paul B. Cromelin and John J. Carmody, constituting a committee of the Bar Association of the District of Columbia known as the Special Committee on Municipal Court Jurisdiction. It is authorized to take this action by resolution of the Board of Directors of said Association.

Consent to the filing of this brief by all parties to this proceeding, as provided by Rule 27 (Par. 9) of this Court, has been obtained and is filed herewith.

The matter involved in this application for writ of certiorari is one of great importance not only to the courts and the members of the Bar of the District of Columbia, but to the public as well. It presents grave questions of jurisdiction of the Municipal Court for the District of Columbia, the District Court of the United States for the District of Columbia, as well as appellate jurisdiction of the Municipal Court of Appeals for the District of Columbia, and the United States Court of Appeals for the District of Columbia. In this brief these courts will be called the Municipal Court, the District Court, the Municipal Court of Appeals and the Court of Appeals, respectively.

II.

The question presented is: Does the Municipal Court possess equity jurisdiction, and, if so, what is the extent of that equity jurisdiction?

On February 11, the United States Court of Appeals for the District of Columbia, handed down the decision in this case and held that the Municipal Court has jurisdiction of civil actions for the enforcement of equitable rights, where only personal property not exceeding $3,000 is involved. The action out of which this appeal had arisen was one for the establishment of a trust on a fund of $1980, or, in the alternative, for a money judgment.

The statute creating the present Municipal Court and prescribing its jurisdiction had been in force for almost two years, and there had been no prior decisions holding that it has equitable jurisdiction, except as to equitable defenses, under Code section 13-214. The decision was a surprise to many members of the Bar, as well as a cause of concern. It cast doubt on the validity of such judgments as may have been entered by the District Court since the effective date of the Municipal Court act in the class of cases now held to be within the jurisdiction of the Municipal Court—this by reason of the fact that except as to counterclaims and cross-claims, there is no area of concurrent jurisdiction of

the District Court and the Municipal Court, the jurisdiction of each court being exclusive within its limits; the decision was felt by many to be contrary to the legislative intent, and it left open to conjecture questions as to whether the Municipal Court could grant equitable relief, such as injunctions, specific performance, administration of trust estates, etc.

The question of whether the Municipal Court has jurisdiction of the enforcement of equitable rights had not been either briefed or argued before the Court of Appeals, the briefs and arguments having concerned themselves with other points considered by counsel in the case to be decisive of the action.

The petitioner, against whom the decision had been rendered, made no application for a rehearing, but on March 22 filed with this Court a petition for certiorari, which is now pending.

The opinion of the Court of Appeals in this case would seem to declare that insofar as the Municipal Court is concerned, the distinction between law and equity is wholly abolished both as to rights and remedies and that cases in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorney's fees, protest fees and costs, does not exceed the sum of $3,000, which were formerly cognizant only in equity, are now within the exclusive jurisdiction of the Municipal Court. This result is reached by the Court of Appeals through an interpretation of the provisions of the Act of Congress of April 1, 1942, 56 Stat. 192, Ch. 207, D. C. Code 1940, Supp. II, Sec. 11-751 et seq.

The act of April 1, 1942 consolidated the then existing Municipal and Police courts. The Municipal Court has always been a court of limited jurisdiction. See Section 11-703 of the District of Columbia Code. The Court of Appeals had held that the Municipal Court had no equity jurisdiction. (*International Exchange Bank* v. *Pullo*, 52 App. D. C. 199, 285 Fed. 933; *Sambataro* v. *Caffo*, 57 App. D. C. 260, 20 F. (2d) 276.)

In consolidating the two courts Congress unmistakably legislated with this jurisdictional restriction clearly in mind. Section 11-755 of the D. C. Code (Supp. 1940) provides as follows:

> "The Court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had and exercised by the Police Court of the District of Columbia, or by the Municipal Court of the District of Columbia, or the judges thereof, on the effective date of this subchapter * * * "

The opinion of the Court of Appeals is based to a great extent on the fact that prior to the enactment of section 11-755 of the Code (Supp. II, 1940) the statute conferred upon the Municipal Court exclusive jurisdiction "in all civil cases in which the amount claimed to be due for debt or damages arising out of contracts, express or implied, or damages for wrongs or injuries to the person or property," whereas section 11-755 omits the expression "debts or damages arising out of contracts express or implied, or damages for wrongs or injuries to the person or property," and substitutes the expression "civil actions * * * in which the claimed value of personal property or the debt or damages claimed." The substitution of the expression "civil actions" for the former expression "civil cases" and the omission of reference to "contracts" and "wrongs or injuries," etc. is thought by the Court of Appeals to justify an imputation to Congress of an intention to confer equity jurisdiction on the Municipal Court.

It is submitted, with deference, that a detailed study of the legislative history of the Court leads to a different conclusion and indicates that nothing was intended except *to increase the monetary limit* of jurisdiction.

The Municipal Court was created by the Act of Congress of February 17, 1909 (35 Stat. 623) which converted what had theretofore been a justice-of-the-peace system into a Municipal Court, having the same jurisdiction as that theretofore exercised by the justices of the peace, with the

exception of an increase in the monetary jurisdiction from $300 to $500. The jurisdiction of the justices of the peace had been fixed by section 9 of the District of Columbia Code of 1901 (31 Stat. 1189), as follows:

> "Sec. 9. JURISDICTION.—The said justices of the peace shall have jurisdiction in all civil cases in which the amount claimed to be due for debt or damages arising out of contracts, express or implied, or damages for wrongs or injuries to persons or property, does not exceed three hundred dollars, including all proceedings by attachment or in replevin where the amount claimed or the value of the property involved does not exceed said sum, except in cases involving the title to real estate actions to recover damages for assault or assault and battery, or for malicious prosecution, or actions against justices of the peace or other officers for official misconduct, or actions for slander or libel, or actions on promises to marry; and said jurisdiction shall be exclusive when the amount claimed for debt or damages or the value of personal property claimed does not exceed fifty dollars, and concurrent with the said supreme court when it exceeds fifty dollars."

Subsequently, by section 1 of the Act of March 3, 1921 (41 Stat. 1310), the monetary limit of jurisdiction of the Municipal Court was increased to $1,000, the statute providing that the Court should have jurisdiction of the classes of cases over which it had had jurisdiction immediately prior to the passage of the Act, and also in actions for the recovery of damages for assault, assault and battery, slander, libel, malicious prosecution, and breach of promise to marry, that is to say it was given jurisdiction over certain classes of cases which had been expressly excluded from the jurisdiction of justices of the peace by Section 9 of the 1901 Code, and from the jurisdiction of the Municipal Court by the Act of 1909, which had restricted the jurisdiction of the Municipal Court to the same classes of cases as those theretofore within the jurisdiction of the justices of the peace.

When the act creating the new Municipal Court was passed, there was no need expressly to include actions for assault, assault and battery, etc., as their exclusion from the jurisdiction of the old Municipal Court had been revoked by the Act of 1921, in consequence of which, at the time of the passage of the Act of 1942 (D. C. Code 1940 Supp. II, sec. 11-755), the Municipal Court had jurisdiction of all actions commonly denominated as law actions. In drafting the act, it was therefore unnecessary to enumerate the various kinds of law actions of which the new Court was to have jurisdiction. It was sufficient merely to provide, as was provided, that the jurisdiction should continue as theretofore, and in order to increase the monetary limit of jurisdiction there was added the provision that the Court should have jurisdiction of civil actions where the amount claimed was not in excess of $3,000. In the light of this historical background of the Court, and the fact that the Court of Appeals had held, as above indicated, that the Municipal Court had no jurisdiction of equitable actions, notwithstanding it had jurisdiction of equitable defenses, it would seem to be apparent that the only purpose of the Act of 1942, as far as increase of jurisdiction was concerned, was to increase the jurisdiction of the Municipal Court as to the *amount* but not as to the kinds of actions. Otherwise, it is reasonable to suppose that some further provisions would have been incorporated into the act effecting the merger, outlining the extent of the Court's jurisdiction, and providing for injunctions, etc., and methods for enforcing its decrees, such as is found in the statute conferring such power on the District Court as an equity court (D. C. Code, sec. 11-326).

In further support of this position, there is printed as an appendix hereto a statement made by the Honorable D. Lawrence Groner, Chief Justice of the Court of Appeals when testifying on July 31, 1941, before the House Committee to which the bill had been referred. It will be noted that the first objective which he mentioned was to increase the jurisdiction (of the new Court), *in amount*, and nowhere

did he or any other witness indicate that included among the objectives of the bill was any other enlargement of the jurisdiction of the Municipal Court including conferring equity jurisdiction on the Municipal Court.

This interpretation is further fortified by the provisions of section 11-756 of D. C. Code, Supp. II, which provide for certification by the District Court to the Municipal Court of cases involving less than $3,000. Under that section, if the action in the District Court is one requiring the Court to grant equitable relief, the District Court has no authority to certify the case to the Municipal Court for trial. If Congress had intended to vest equitable jurisdiction in the Municipal Court the exception regarding cases involving equitable relief would have been meaningless. Even if there were an ambiguity in section 11-755, (reading it alone) it seems indisputable that the intention of Congress is clearly reflected in section 11-756. If it was intended to vest the Municipal Court with the power to grant equitable relief within its jurisdictional amount, there was no need for the exception in Section 11-756.

Moreover under the provisions of Section 11-756 (c) the only power of the Municipal Court to punish for contempt is by a fine not exceeding $50.00, or imprisonment not exceeding thirty days. If it were intended to vest the Court with equitable jurisdiction, would such a provision have been inserted in the Act? If, for example, in an injunction proceeding involving $3,000 the defendant openly flouts the Court's order, would it be reasonable to suppose that the Court was limited in punishing the defendant for contempt of Court by a nominal fine of $50 or a short jail sentence? It should also be noted that the power to punish is in the disjunctive, by fine *or* imprisonment.

As was said by the Court of Appeals in *International Exchange Bank* v. *Pullo*, 52 App. D. C., 199, 285 Fed. 933, in discussing the question of whether the statute there under consideration gave the Municipal Court jurisdiction of equitable defenses.

> "If Congress had intended to effect so radical a change in the jurisdiction of that court, it is reasonable to believe that the purpose would be expressed in more specific terms * * * "

It is to be observed that *the District Court and the Municipal Court do not have any concurrent jurisdiction. Jurisdiction is mutually exclusive.* If the Municipal Court has the equity jurisdiction, as herein discussed, then the District Court has not such jurisdiction.

Not only does the opinion of the Court of Appeals appear to be contrary to the clear intent of Congress, but it fails to clarify or state the precise boundaries of such equitable jurisdiction as it does find that the Municipal Court possesses. The language of the opinion leaves open for future consideration and litigation the question of how far this equitable jurisdiction extends. Does, it for example, extend in suits for divorce which while strictly speaking are not equity suits are civil actions and have heretofore been within the equity jurisdiction of the District Court. (D. C. Code Sec. 11-325) And apart from the question of equitable rights, does the Municipal Court have power also to grant equitable remedies, such as prohibitory injunctions, mandatory injunctions, specific performance, reformation of contracts and the like? These questions are left undetermined by the opinion. (See *Rowe* v. *Nolan Finance Company*, decided by U. S. Court of Appeals, District of Columbia, April 10, 1944.) This creates a situation which is dangerous to the rights of litigants who may find themselves barred by the statute of limitations from going to the right court after it has been determined that they have originally proceeded in the wrong court—and, even more important than that there may be many cases in which there will be doubt as to the validity of the judgment, since the judgment rendered by a court having no jurisdiction the subject matter is void for all purposes, and may be collaterally attacked.

The doubts and dangers which the opinion creates are very real—the difficulties obvious.

Since appeals from the Municipal Court are taken to the Municipal Court of Appeals, with limited and discretionary right of review of the decisions of that Court by the Court of Appeals (Sec. 11-773 D. C. Code, Supp. II)—and appeals from the District Court go to the Court of Appeals, it is apparent that the appellate jurisdiction of each of these courts is likewise involved.

III.

It is respectfully submitted that because of the importance of the questions involved the petition for writ of certiorari should be granted.

LAWRENCE KOENIGSBERGER,
Chairman,
HUGH H. OBEAR,
PAUL B. CROMELIN,
JOHN J. CARMODY,
Committee of the Bar Association of the District of Columbia.

APPENDIX.

July 31, 1941, statement of Hon. D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia on hearing on consolidation of the District of Columbia courts (page 3)—

"When the matter of some legislation looking to the improvement of conditions in the Municipal Court and the Police Court was first discussed with the Department of Justice, the objective was, I think I might say, threefold. There were three objectives which the department had in mind, all of which I thoroughly sympathized with.

One objective was to increase the jurisdiction, in amount, of the new court to be established by the consolidation of the two present courts, and the purposes of that are twofold, first, to provide speedier trial and the determination to litigants in local controversies involving not to exceed $3,000.

By the *increase in the amount of jurisdiction* which the new court would have it is believed that a great many cases which now necessarily are brought in the United States District Court would be brought in the new court.

The United States District Court here is, I think I may correctly say, perhaps the busiest United States District Court in the entire Federal system not excluding New York. In the number of cases and the importance and in the Federal aspect of cases that court has a most unusual burden.

There are 12 judges of that Court, and they work, I think, as consistently and as steadily as judges can reasonably be expected to work. But notwithstanding that, it has been necessary to bring in judges from the outside to assist the District Court judges in the disposition of their calendars. This summer, for instance, more than six judges from the outside have helped that Court in the trial of cases.

It was also thought that by increasing that jurisdiction the cost of litigation to the citizen would be materially reduced because, in the very nature of things, under the rules which obtain in the District Courts of the United States, the actual expense of trying a case

is greater in the United States District Court than it would be in the newly created Municipal Court. That was the first objective.

The second objective was to provide some means whereby the power of the court could be utilized to the fullest extent by the addition of one judge, with a provision for an additional judge who would have the supervisory control of the administration of justice and the conduct of business in that court, and the thought in connection with that was that some things which had been the subject of severe criticism could be avoided in the future. * * *

The third objective was to provide an appeal by right to litigants in these cases. At one time there was an appeal to the United States District Court. That court is one year and four months behind in its work and has been for a long time.

MR. MCGEHEE: The purpose in providing for an intermediate court of appeals is to relieve the United States Court to some extent, as I understand it.

CHIEF JUSTICE GRONER: It is to relieve the United States District Court and to enable it to become current with its docket without the appointment of additional judges. * * *'' (Italics supplied.)